

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

4 UNITED STATES OF AMERICA, - Docket No. 3:06-CR-719
5 Plaintiff, -
6 v. - Toledo, Ohio
7 - April 21, 2008
8 - Trial
9 -
10 MOHAMMAD ZAKI AMAWI, et al., -
11 Defendants. -
12 -----

13 VOLUME 31, TRANSCRIPT OF TRIAL
14 BEFORE THE HONORABLE JAMES G. CARR
15 UNITED STATES DISTRICT CHIEF JUDGE

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1 (The jury is not present.)

2 THE COURT: What I would propose we do is look at

-16:-19:-55 3 the excerpts that have been designated by Mr. Mazloum. Does

-16:-19:-55 4 somebody have a set I can be looking at up here, so I can be

-16:-19:-55 5 following along, as it were.

-16:-19:-55 6 MR. SOFER: What the government has are -- we have

-16:-19:-55 7 sort of examples of the kinds of problems that we've seen. If

-16:-19:-55 8 you want, we could try using -- I don't know if the Court's

-16:-19:-55 9 system is working or not, but we could put them on the ELMO,

-16:-19:-55 10 then everyone can see them. We don't have a full set because

-16:-19:-55 11 some of these were still -- we're going to have to listen to

-16:-19:-55 12 some of these. We're in the process of having to listen to some

-16:-19:-55 13 of them.

-16:-19:-55 14 Just so it's clear, first of all, I don't think the

-16:-19:-55 15 government has the burden -- although it is the government

-16:-19:-55 16 that's brought this, I guess, to the Court's attention, but it's

-16:-19:-55 17 certainly not the government's burden to establish the

-16:-19:-55 18 admissibility of all this. But I'm going to tell the Court what

-16:-19:-55 19 we've done to try to analyze it.

-16:-19:-55 20 Where possible, we've used the computer to take the

-16:-19:-55 21 transcript and compare it to the government's transcript. And

-16:-19:-55 22 so we do have with us, I believe, a new document which

-16:-19:-55 23 essentially is a marked-up version where you can tell the

-16:-19:-55 24 difference. It's a comparison; it's a single document. That

-16:-19:-55 25 way I think we have a full copy of what we've been able to get

-16:-19:-55 **1** to so far. Then I've tried to pull out examples of the
-16:-19:-55 **2** problems. We are also prepared, at least with respect to some
-16:-19:-55 **3** of what's been provided to us by Mohammad Amawi, to present Your
-16:-19:-55 **4** Honor with -- we were able to clip the audio with the
-16:-19:-55 **5** transcript, and we can demonstrate where we think these are
-16:-19:-55 **6** wrong in terms of audibility. I think I told Your Honor this
-16:-19:-55 **7** morning, there's not that many of these. We can get through
-16:-19:-55 **8** those rather quickly if you want to do that first so we're
-16:-19:-55 **9** making a jump forward. It might be one way of proceeding.
-16:-19:-55 **10** We've put --

-16:-19:-55 **11** As I said, we put them into our pretrial
-16:-19:-55 **12** presentation software. We can do it just like we've been doing
-16:-19:-55 **13** it in court. I would propose that Your Honor look at these,
-16:-19:-55 **14** look at the transcripts, and assuming our audio here is in
-16:-19:-55 **15** decent shape, I think we may have -- did we bring our speakers?
-16:-19:-55 **16** I think we've said before, there are times it would be easier to
-16:-19:-55 **17** listen on a PC than using the Court system. But we can try to
-16:-19:-55 **18** play them and see if Your Honor can go through them and
-16:-19:-55 **19** determine what's audible and inaudible, and what words are right
-16:-19:-55 **20** and wrong. And then we have examples from the Amawi case, at
-16:-19:-55 **21** least, where we think that the hearsay problem is at least
-16:-19:-55 **22** highlighted, although I think the hearsay problem is throughout
-16:-19:-55 **23** many of the transcripts and the proposed cross-examination
-16:-19:-55 **24** materials.

-16:-19:-55 **25** And then we have a few, just a few, relevancy

-16:-19:-55 **1** examples, examples where either we can't figure out why they are
-16:-19:-55 **2** relevant, which of course would be maybe our own lack of
-16:-19:-55 **3** insight; or we think we may have figured it out, but it's still
-16:-19:-55 **4** not relevant in the government's opinion.

-16:-19:-55 **5** So we'll proceed however Your Honor wants us to
-16:-19:-55 **6** proceed. I do think the best thing to do would be to go
-16:-19:-55 **7** through every one of them. But I don't have every single one
-16:-19:-55 **8** of them in the defense form. I think we have every single one
-16:-19:-55 **9** of them in a sort of newer, different form; that's what the
-16:-19:-55 **10** government has.

-16:-19:-55 **11** THE COURT: Have you talked with Counsel about the
-16:-19:-55 **12** variant transcriptions?

-16:-19:-55 **13** MR. SOFER: We have not. That's partially because
-16:-19:-55 **14** we've been running around trying to catch up on the El-Hindi
-16:-19:-55 **15** stuff. We could actually do that right now if you like. And I
-16:-19:-55 **16** assume they're standing by their transcripts. I don't know.
-16:-19:-55 **17** If there's something to talk about, we certainly will.

-16:-19:-55 **18** THE COURT: Mr. Ivey, did you work off of an
-16:-19:-55 **19** enhanced copy, or your transcribers?

-16:-19:-55 **20** MR. WHITMER-RICH: No, Your Honor. We did know
-16:-19:-55 **21** what we provided to the government, as a first instance, if we
-16:-19:-55 **22** were providing them a clip from something they played, like a
-16:-19:-55 **23** smaller clip of something they played during the trial, we used
-16:-19:-55 **24** the government's transcript with maybe one or two exceptions,
-16:-19:-55 **25** and I assume there aren't any problems with those.

-16:-19:-55 **1** As a second instance, we used the government's
-16:-19:-55 **2** preliminary transcript when they provided the whole transcripts
-16:-19:-55 **3** to us some time ago. We used that section. In a few instances
-16:-19:-55 **4** we changed very minor things, which I don't imagine there would
-16:-19:-55 **5** be objections to. And then only in the last category of cases
-16:-19:-55 **6** where there were, we thought, a significant phrase or section
-16:-19:-55 **7** that were not being captured, were unintelligible, or the
-16:-19:-55 **8** translation was incorrect; those we provided our own versions of
-16:-19:-55 **9** the transcription; those were not made from enhanced audio.
-16:-19:-55 **10** They were simply based on the original audio files.

-16:-19:-55 **11** THE COURT: How long would it take to go through
-16:-19:-55 **12** everything that you have that you -- there's disagreement as to
-16:-19:-55 **13** either the translation or the transcription.

-16:-19:-55 **14** MR. SOFER: I don't think very long at all.

-16:-19:-55 **15** Do you want us to do that in front of Your Honor or
-16:-19:-55 **16** are you suggesting we talk to Counsel first?

-16:-19:-55 **17** THE COURT: Why don't we do it now and I'll make my
-16:-19:-55 **18** mind up.

-16:-19:-55 **19** MR. SOFER: What I will say, Your Honor, is I've
-16:-19:-55 **20** picked the best examples. We're going to need to make sure,
-16:-19:-55 **21** like with El-Hindi's Counsel, since these things came in sort of
-16:-19:-55 **22** multiple pieces that we've actually received and analyzed, and
-16:-19:-55 **23** so I just want to reserve the right in case there's something
-16:-19:-55 **24** else out there that we don't have to take a look and make sure
-16:-19:-55 **25** we can go back and challenge it. I think -- is the Court

-16:-19:-55 **1** system on? Are we able --

00:01:40 **2** 1D17. I think we have to tell the Court what it

-16:-19:-55 **3** is -- it is all right with you guys if I give this to him.

-16:-19:-55 **4** This is the portion there's a disagreement about. And the --

-16:-19:-55 **5** this one is essentially the question between the word leaving

00:03:03 **6** and live in, "live in" versus "leaving". So it's the second

-16:-19:-55 **7** time Amawi speaks in this particular clip.

-16:-19:-55 **8** (Audio played.)

-16:-19:-55 **9** MR. SOFER: We can play it multiple times. This

-16:-19:-55 **10** is what we go through multiple times every time you have to

-16:-19:-55 **11** listen to it.

00:03:50 **12** MR. BOSS: What are we looking at, the government's

00:03:52 **13** version?

00:03:53 **14** MR. SOFER: The government's transcript.

00:04:07 **15** MR. IVEY: We'll agree with "leaving".

00:04:11 **16** MR. SOFER: That was easiest thing we've done yet.

-16:-19:-55 **17** It doesn't make sense "live in".

00:04:21 **18** MR. WITMER-RICH: If you want to send me and

-16:-19:-55 **19** somebody else off in another room.

-16:-19:-55 **20** MR. SOFER: Maybe we could do that, Judge.

00:04:29 **21** THE COURT: Why don't we do that.

00:04:37 **22** Are there still troops available to address the

-16:-19:-55 **23** evidence issues?

-16:-19:-55 **24** MR. SOFER: Maybe we ought to pull this one before

00:04:50 **25** we go out and try to resolve because I do think this actually

00:04:57 **1** highlights two points. This is 1D52. You guys called it

00:05:10 **2** 4-20-05 Clip 2.

00:05:18 **3** THE COURT: Would it be easier to display it?

00:05:22 **4** MR. SOFER: I can put this up. It's got my notes.

00:05:33 **5** We can't play our clip and use the ELMO at the same

00:05:37 **6** time.

00:05:40 **7** THE COURT: How would you rather show me what the

-16:-19:-55 **8** issue is?

00:05:43 **9** MR. SOFER: Assuming the defense doesn't have a

-16:-19:-55 **10** problem with this -- I want to show it to them. It has my

-16:-19:-55 **11** notes on it.

00:06:11 **12** MR. HARTMAN: I don't care.

-16:-19:-55 **13** THE COURT: Do you have a copy yourself?

-16:-19:-55 **14** MR. SOFER: I don't, but I remember the issue.

-16:-19:-55 **15** This one, Your Honor, if I can just describe what

-16:-19:-55 **16** the issue is. There is a line of text that's been added by the

-16:-19:-55 **17** defense which I think is -- you can see it's in a different font

00:06:30 **18** or a different color -- which the government cannot hear when we

00:06:35 **19** listen to this. No matter how we've listened to it, we've not

00:06:41 **20** heard that line in there. And concurrently the defense has

00:06:45 **21** dropped out a rather large piece at the end, which we can

-16:-19:-55 **22** discuss. But that's the change that we have. So the

00:06:59 **23** audibility issue, this is one of those few instances where

-16:-19:-55 **24** actually the government's contention is this is inaudible. We

-16:-19:-55 **25** don't hear what they've written on that piece of paper.

-16:-19:-55 **1** THE COURT: Where is -- it is the set-off

-16:-19:-55 **2** paragraph?

00:07:15 **3** MR. SOFER: You're going to focus on, if I may

-16:-19:-55 **4** approach, Your Honor, it's this line up here that says -- it's

00:07:28 **5** the line from -- it says, "Boss" here instead of who it actually

-16:-19:-55 **6** is. "Did you try to push them out there." Which, of course, I

-16:-19:-55 **7** think it's obvious what the government's concern is there. We

-16:-19:-55 **8** don't hear that on this tape.

00:07:47 **9** THE COURT: Who is speaking to whom now?

-16:-19:-55 **10** MR. SOFER: That's Darren Griffin speaking to -- I

-16:-19:-55 **11** believe it's Shannon Coats. So it's a conversation in which

00:08:03 **12** Darren Griffin is explaining what has happened in a particular

00:08:09 **13** interaction, and --

00:08:12 **14** THE COURT: In other words, the issue is what is

00:08:16 **15** attributed to --

00:08:19 **16** MR. SOFER: -- Agent Coats.

-16:-19:-55 **17** THE COURT: After the word "Boss" is designating

-16:-19:-55 **18** him?

00:08:26 **19** MR. SOFER: Yes, Judge.

-16:-19:-55 **20** THE COURT: It's in the smaller type.

-16:-19:-55 **21** MR. SOFER: Correct. That's how we did the

00:08:32 **22** comparisons. The program produces that smaller, darker type.

00:08:40 **23** THE COURT: Where will you begin the clip?

00:08:42 **24** MR. SOFER: We've tried to sort of frame it out a

-16:-19:-55 **25** little bit. You have it in front of you now, Judge; the line

-16:-19:-55 **1** in question on what you have.

00:09:07 **2** THE COURT: I made a mistake and turned these

-16:-19:-55 **3** things off.

00:09:33 **4** MR. SOFER: So, again, on the scrolling text before

00:09:36 **5** you, Your Honor, on -- as opposed to the piece of paper, it's

-16:-19:-55 **6** the third line that's up there.

00:09:43 **7** (Audio played.)

00:09:48 **8** (Video played.)

00:10:07 **9** THE COURT: Can you back up? Can you get a little

00:10:10 **10** before that, "Yes, sure did."

00:10:18 **11** THE VIDEO OPERATOR: I'll go back to the beginning.

00:10:21 **12** THE COURT: Please do.

00:10:30 **13** (Video replayed.)

00:10:47 **14** THE COURT: Can you start --

00:10:56 **15** MR. SOFER: At the beginning, Judge?

00:10:59 **16** THE COURT: Yeah.

00:11:59 **17** (Video replayed.)

00:11:59 **18** THE COURT: I do hear "Push them". The rest, I

-16:-19:-55 **19** don't hear that. Maybe the thing would be to put Agent Coats

-16:-19:-55 **20** on the stand and ask him if he recalls what he said. It's his

00:12:17 **21** voice. He would be the person in the best position to identify

-16:-19:-55 **22** what he was saying. Is he here?

00:12:23 **23** MR. SOFER: He is here. I'd like two minutes to

-16:-19:-55 **24** talk to him before we throw him on the witness stand. I don't

00:12:32 **25** have a problem with that.

00:12:33 **1** THE COURT: He seems to be the best source. We
-16:-19:-55 **2** haven't discussed it very much.

00:12:54 **3** MR. WHITMER-RICH: Your Honor, the headphones do
-16:-19:-55 **4** provide a pretty good level of audibility. These transcripts
-16:-19:-55 **5** would have been made listening to this on an iPod, which does
00:13:04 **6** provide yet better -- even than what we have on these
00:13:08 **7** headphones, a better level of audibility. Again, it's not
00:13:12 **8** enhanced audio, but it was being listened to on an iPod.

00:13:42 **9** THE COURT: Perhaps do you have that iPod?

00:14:12 **10** MR. WHITMER-RICH: We can also listen to it with
-16:-19:-55 **11** earphones.

00:14:25 **12** (Agent Coats is sworn by the Court.)

00:14:38 **13** THE COURT: It's your representation that one can
-16:-19:-55 **14** hear better through that device; is that correct?

00:14:49 **15** MR. HARTMAN: Yes.

00:14:51 **16** THE COURT: How do we then project that for the
00:14:54 **17** jury?

00:14:55 **18** MR. SOFER: That's been one of our problems
-16:-19:-55 **19** throughout, is the Court system, while much better with the
00:15:04 **20** headphones, is not as good as sometimes even just a PC with one
-16:-19:-55 **21** of these set of speakers put in. So I don't have an answer for
00:15:19 **22** that, Judge.

00:15:23 **23** THE COURT: I mean, can you play that thing, and
00:15:27 **24** we'll play this through a microphone? Will that work?

00:15:32 **25** MR. HARTMAN: Can we go get the enhancements we've

-16:-19:-55 **1** made, and we can put those over the earphones. We made those
-16:-19:-55 **2** because of how bad the audio was in this room. When we got the
00:15:42 **3** earphones we realized the sound was much better. But it was
-16:-19:-55 **4** before this issue came up about the specific word here and
-16:-19:-55 **5** there. We can try to use the enhanced audio over this Court
-16:-19:-55 **6** system and see if that works better.

00:15:59 **7** THE COURT: Where are they?

00:16:01 **8** MR. HARTMAN: They're in my office. I can have
-16:-19:-55 **9** somebody bring them over.

00:16:06 **10** THE COURT: Why don't do you that.

00:16:10 **11** My concern, it isn't -- even if I can hear it
-16:-19:-55 **12** because of some device that you have, if that's not somehow
00:16:21 **13** projectable into the Court system, how -- I don't care how it is
00:16:28 **14** presented to the jury, but I shouldn't be making a ruling on
-16:-19:-55 **15** something that is not what the jury will be exposed to.

-16:-19:-55 **16** MR. HARTMAN: Judge, if I may, when this issue came
-16:-19:-55 **17** up on a pretrial basis, as it did many, many times, the answer
-16:-19:-55 **18** that we got from the Court was, I'm going to tell the jury that
-16:-19:-55 **19** what they hear is the evidence, and what they see is not. We
00:16:51 **20** think the government has a bunch of things wrong that we were
-16:-19:-55 **21** going to present transcripts and say: This is what the
-16:-19:-55 **22** government said; this is what we said. And what you hear --
00:17:02 **23** and you're going to have to decide what you hear is correct.

-16:-19:-55 **24** And now doing this, it seems to me that we're kind of going back
-16:-19:-55 **25** the other way, which is fine if that's what the Court wants to

-16:-19:-55 **1** do, but my recollection, and you can correct me if I'm wrong,
-16:-19:-55 **2** was that we were going to have the ability to put our transcript
-16:-19:-55 **3** up for what we thought it said, and the jury would be instructed
00:17:24 **4** accordingly.

00:17:27 **5** MR. SOFER: I think what the government has said
-16:-19:-55 **6** over and over again, that we don't think that's a proper and
-16:-19:-55 **7** fair way of proceeding. That, and I think if you look at the
-16:-19:-55 **8** cases, that is not the way that most cases are presented to
-16:-19:-55 **9** juries in which there are tapes. The audibility hearing in the
00:17:45 **10** Court is often in the situation where there are -- if there are
-16:-19:-55 **11** multiple versions of something -- we are down to the
00:17:53 **12** nitty-gritty here, it's not like we're talking about vast
-16:-19:-55 **13** sections of transcript, that the Court can make a determination
-16:-19:-55 **14** of what is audible and what is not and what words are on there
-16:-19:-55 **15** and what words are not, and otherwise what you end up doing, I
-16:-19:-55 **16** think, is a serious problem for the government because we carry
-16:-19:-55 **17** the burden. It's basically saying to them, well, you know,
00:18:15 **18** here's the transcripts, here's some more transcripts, maybe it's
-16:-19:-55 **19** right, maybe it's not right. And we don't want to be in that
-16:-19:-55 **20** position. We're comfortable having Your Honor listen to this
-16:-19:-55 **21** and make a determination. We think it's --

-16:-19:-55 **22** THE COURT: My problem is a preliminary one of how
00:18:36 **23** whatever it is that is there can best be heard by the jury. I
-16:-19:-55 **24** heard the words "push" and "then", but the other words just go
-16:-19:-55 **25** so quickly, and there's a lot of static. If you have a means

-16:-19:-55 **1** and a way of projecting something with greater fidelity and
00:19:05 **2** clarity, that's fine. But I don't see how -- how you propose
-16:-19:-55 **3** to again rely upon the version that we're listening to right
00:19:22 **4** now, or is there some other version?

-16:-19:-55 **5** MR. HARTMAN: No, there's a version that has been
00:19:27 **6** enhanced that we didn't think we needed.

00:19:31 **7** MR. WITMER-RICH: I can play that in five minutes.

-16:-19:-55 **8** THE COURT: Can it be played somehow so the jury
-16:-19:-55 **9** can hear it? Because that's what matters.

00:19:42 **10** MR. HARTMAN: Yes. There is a way to do that.

00:19:44 **11** THE COURT: How soon can that be set up? By 8:30
-16:-19:-55 **12** Wednesday morning?

00:19:50 **13** MR. WITMER-RICH: If we can hear the enhanced audio
00:19:55 **14** more clearly, we'd play it through the Court system. It might
-16:-19:-55 **15** be the enhancement will allow us to do that.

00:20:04 **16** THE COURT: Mr. Hartman, can you call somebody in
-16:-19:-55 **17** your office?

00:20:08 **18** MR. HARTMAN: I will, Judge, right now.

-16:-19:-55 **19** MR. SOFER: On this issue, Judge, I'm just asking
-16:-19:-55 **20** for fairness here. I don't know who enhanced these tapes, how
-16:-19:-55 **21** they enhanced these tapes, what they were told about enhancing
-16:-19:-55 **22** the tapes. I think the government should have at least some
00:20:25 **23** opportunity to delve into that before we play things for the
00:20:28 **24** jury.

-16:-19:-55 **25** I can only imagine if the government suddenly came

00:20:32 **1** out with a bunch of enhanced tapes what Counsel would say if it
00:20:36 **2** was done at this late stage of the game. So -- maybe this will
00:20:45 **3** -- one, if we listen to the enhanced version, the government
-16:-19:-55 **4** will agree. I think we've said over and over again, we're not
-16:-19:-55 **5** trying to pull the wool over these people's eyes. We want them
-16:-19:-55 **6** to hear the truth. If that's what it says, let it play. It's
00:21:02 **7** just that we, given our system and our fidelity, we don't hear
-16:-19:-55 **8** it, and certainly not the way it's put down on paper there.
00:21:09 **9** And so we're just looking for a fair way to resolve this.

-16:-19:-55 **10** THE COURT: I agree. It's at best borderline with
-16:-19:-55 **11** the version that we hear. And certainly I don't propose that
00:21:29 **12** we do before the jury as we did now for half an hour: Replay,
-16:-19:-55 **13** replay, replay, replay, hoping that the ear may pick up enough
00:21:40 **14** of the transmission to comprehend what it is. But if there is a
-16:-19:-55 **15** version that is more clear because they bumped up the static or
00:22:01 **16** whatever, that's fine.

00:22:04 **17** MR. SOFER: While we're waiting for that, Judge, I
00:22:07 **18** think rather than have Agent Coats testify, I think we should
-16:-19:-55 **19** let that resolve itself, if that's acceptable to Your Honor.

-16:-19:-55 **20** THE COURT: Agent Coats, you may step back down.

-16:-19:-55 **21** MR. SOFER: Some of his finest testimony.

00:22:21 **22** THE COURT: Giving a new meaning to the term silent
-16:-19:-55 **23** witness.

-16:-19:-55 **24** MR. SOFER: We'll send a representative back with

00:22:28 **25** Amawi's Counsel to see if we can resolve these things, and maybe

-16:-19:-55 **1** we'll get from nine to two, and we'll resolve them however they
00:22:37 **2** get resolved. Again, if we're comfortable with the way the
-16:-19:-55 **3** tapes were enhanced, and you can hear something on them, by all
-16:-19:-55 **4** means we're amenable to playing them for jury. So can we --
00:22:49 **5** THE COURT: Now let me ask you, let's assume that
-16:-19:-55 **6** in this excerpt they are correct and we have somewhere an audio
-16:-19:-55 **7** version that with a sufficient degree of certainty we can all
00:23:06 **8** say, okay, the transcript can be displayed. What about playing
00:23:12 **9** this excerpt at this stage of the case?

00:23:15 **10** MR. SOFER: Well, that's interesting since the
-16:-19:-55 **11** government already played this excerpt, I believe. In fact, I
-16:-19:-55 **12** would say, Counsel will correct me, I can't speak for El-Hindi
00:23:26 **13** yet, I would say at least half, maybe more, of what the Amawi
00:23:34 **14** Counsel have proposed playing fall within segments that the
-16:-19:-55 **15** government has already played for the jury. So the question
00:23:46 **16** here is whether or not playing this again is appropriate during
00:23:56 **17** cross-examination. I would say that.

-16:-19:-55 **18** I don't know what questions the defense plans on
-16:-19:-55 **19** asking Mr. Griffin, but he's already testified that he
00:24:13 **20** accidentally recorded this. I don't think there's any dispute
00:24:16 **21** about the fact that this conversation took place, that
00:24:22 **22** conversation itself is already in evidence.

00:24:27 **23** THE COURT: Let me say, I know where you're headed.
-16:-19:-55 **24** It does seem to me this is more appropriately played during the
-16:-19:-55 **25** defense version because, I mean I -- I would suppose you could

-16:-19:-55 **1** ask Mr. Griffin, were you asked by Agent Coats -- I mean, I
-16:-19:-55 **2** suppose the issue is the extent to which Agent Coats was
00:25:05 **3** directing him to encourage him to do certain things. What's
-16:-19:-55 **4** the --

00:25:15 **5** MR. IVEY: Well, Your Honor, in general I don't
00:25:17 **6** think we should be required to divulge ahead of time what our
00:25:21 **7** strategies are about something. My point simply is that any
-16:-19:-55 **8** time the -- in any case, when the prosecution puts in a piece of
-16:-19:-55 **9** evidence in their case, to then say you can't ask questions
-16:-19:-55 **10** about it, you have to accept what was said on direct, is
00:25:40 **11** incredible.

-16:-19:-55 **12** THE COURT: That's not the issue. The issue is
00:25:43 **13** whether whatever the questions are, will they provide a
-16:-19:-55 **14** predicate for playing -- replaying this conversation.

00:25:51 **15** MR. IVEY: Yes. If I asked the witness a question
-16:-19:-55 **16** that didn't this occur, something you did, not what Mr. Amawi
-16:-19:-55 **17** said, but didn't you do this, didn't you say this and that, and
00:26:04 **18** then the witness then says, no, I did not, then if that
-16:-19:-55 **19** transcript shows that, in fact, that he's not being honest about
-16:-19:-55 **20** what happened --

-16:-19:-55 **21** THE COURT: It's not the transcript; it's the
00:26:15 **22** recording.

-16:-19:-55 **23** MR. IVEY: I'm sorry, the recording shows something
00:26:18 **24** different. If I ask the witness, you interjected this, you
-16:-19:-55 **25** represented this to your boss when, in fact -- or to the handler

-16:-19:-55 **1** when, in fact, that's not what happened. And he says, No, Mr.
00:26:31 **2** Ivey, you're wrong. I think we should be able to play it to
-16:-19:-55 **3** show which way it is. That's just basic impeachment.
00:26:39 **4** MR. SOFER: I don't disagree with that, Judge.
-16:-19:-55 **5** THE COURT: Neither do I.
00:26:43 **6** MR. SOFER: If the situation unfolded that way the
-16:-19:-55 **7** government is perfectly comfortable with it being done.
-16:-19:-55 **8** Although, again, it has to be done according to the rules. The
00:26:52 **9** witness has to be asked those particular questions; he has to be
-16:-19:-55 **10** given an opportunity to deny making the statement, or explain
00:26:59 **11** his answer. And only if and only we -- what's left over is
00:27:05 **12** essentially an impeachment of the witness by playing the
-16:-19:-55 **13** intrinsic evidence would you be able to bring it in. Even then,
-16:-19:-55 **14** Judge, there normally would be an instruction. Here in this
-16:-19:-55 **15** particular case the transcripts -- the record's already in
-16:-19:-55 **16** evidence, so I don't really think there's much of an issue.
00:27:25 **17** It's already in evidence.
-16:-19:-55 **18** But there are other recordings which are not in
00:27:29 **19** evidence, and they don't go into evidence when they're being
00:27:34 **20** used to impeach a witness. And this goes to the whole
00:27:39 **21** goose/gander analogy. The government doesn't get to put in
-16:-19:-55 **22** out-of-court statements that way, nor does the defense. And
-16:-19:-55 **23** there's an instruction usually given, a very common instruction
-16:-19:-55 **24** that this is being introduced with respect to whatever the
00:27:54 **25** credibility of the witness is or to impeach the witness. It's

-16:-19:-55 **1** not evidence.

00:28:00 **2** MR. IVEY: Your Honor, again, we are not confined

00:28:04 **3** to what the government decides we can cross-examine. And if I

-16:-19:-55 **4** ask the witness something about --

-16:-19:-55 **5** THE COURT: I understand. My concern, I'm

-16:-19:-55 **6** concerned now, I realize I'm circling back and forth, but I am

00:28:22 **7** concerned -- let's assume you ask an appropriate predicate

00:28:25 **8** question. I'm not going to ask you to tell me what you believe

-16:-19:-55 **9** that might be. Assuming that, then you want to play this

00:28:35 **10** excerpt, and display the translation that you have provided to

-16:-19:-55 **11** the government, I'm not sure that it's sufficiently audible, the

00:28:50 **12** version I've heard so far, that I can say, fine, it's okay to

-16:-19:-55 **13** display this version.

00:29:01 **14** MR. IVEY: I thought Mr. Sofer was making a more

00:29:05 **15** global argument.

-16:-19:-55 **16** THE COURT: He is. Contrary to my expectation

-16:-19:-55 **17** that I'm going to be able to address those because you have an

-16:-19:-55 **18** understandable reluctance to lay your -- to show whether you're

00:29:17 **19** going to be playing diamonds, clubs, spades or hearts. I

-16:-19:-55 **20** understand that. That's the way the world works. And I'm

00:29:26 **21** just trying to avoid constant interruption by side bar.

00:29:35 **22** MR. IVEY: Well, I guess I thought that that was

-16:-19:-55 **23** the purpose of this hearing. If the Court determines that this

-16:-19:-55 **24** is inaudible to the point that it can't be shown, then obviously

-16:-19:-55 **25** I can't ask questions. On the other hand, I think we should be

00:29:50 **1** allowed to present the enhanced version to see if you hear it.

-16:-19:-55 **2** The Court has indicated that at least in listening to -- over

-16:-19:-55 **3** the Court system you heard the word "push", as I did too, and so

00:30:05 **4** when the government -- I think it's just a natural tendency, I'm

-16:-19:-55 **5** not ascribing insidious motive to anybody. But we want to hear

-16:-19:-55 **6** it; obviously, they don't want to hear it. Naturally I think

-16:-19:-55 **7** that affects it. The government said: We don't hear it at

-16:-19:-55 **8** all. The Court heard "push". "Push" was used for some

00:30:26 **9** reason. And I think the logical reason that word was used is

-16:-19:-55 **10** for what we're saying. I'm just asking for an opportunity to

-16:-19:-55 **11** provide that heightened version. If you can hear that clearly,

-16:-19:-55 **12** then we'll go to the issue of whether there's anything wrong

00:30:42 **13** with the enhancement. We know we have an audibility problem.

-16:-19:-55 **14** And if we present an enhancement, the Court can hear it, then

-16:-19:-55 **15** they could make their argument as to why the enhancement should

-16:-19:-55 **16** be considered, then the Court can make a ruling.

00:30:56 **17** MR. SOFER: I have no problem with that.

00:30:59 **18** MR. IVEY: I will have to live with it.

00:31:04 **19** MR. DOUGHTEN: I don't mind telling you what we're

00:31:07 **20** going to do because it is what it is. I'm a little bit

-16:-19:-55 **21** concerned with the government's objection. First of all, we're

-16:-19:-55 **22** not sure whether we're going second or third yet. Being

00:31:19 **23** concerned that perhaps we might be going second, we've had to go

-16:-19:-55 **24** over the tapes to make sure there's anything that we want in

-16:-19:-55 **25** that isn't already in. We've done the major session, we just

-16:-19:-55 **1** have a little bit more to go. But more importantly, Your Honor,
-16:-19:-55 **2** I don't know how to effectively cross-examine.

-16:-19:-55 **3** Here's our issue. We have a section of tape where

00:31:42 **4** Griffin is saying -- giving his views, and a defendant starts to

-16:-19:-55 **5** interject his viewpoint, starts going in a different direction.

-16:-19:-55 **6** Griffin cuts him off and brings it back to the area that he

-16:-19:-55 **7** wants to talk about. I don't know how we can ask a predicate

-16:-19:-55 **8** question about: Is it a fact that on February 16 at 19, 20

00:32:09 **9** seconds... It's impossible to do it. I don't expect Griffin

-16:-19:-55 **10** to remember those things. What we had in mind is playing an

-16:-19:-55 **11** exhibit that was already in evidence and kind of go over those

00:32:21 **12** sections and saying: Okay, at this point didn't you cut off Mr.

00:32:25 **13** So-and-so? Point that out and give Griffin an opportunity to

-16:-19:-55 **14** say why he did it or what his intention was. And didn't this

00:32:34 **15** happen five times during this three-minute period? That sort of

-16:-19:-55 **16** thing. I don't know of any other way to ask the predicate

00:32:41 **17** question. And at 2:10 in the evening of whatever day it is when

-16:-19:-55 **18** you asked --

-16:-19:-55 **19** THE COURT: I think you can ask him: During the

00:32:54 **20** conversation, were there occasions where Mr. Mazloun and you

-16:-19:-55 **21** were having a conversation, whatever the date is, but were there

-16:-19:-55 **22** not occasions where you and he were conversing and he would

00:33:17 **23** attempt to raise or discuss certain topics and you would

00:33:23 **24** interrupt him and return to the topic of training or X or

-16:-19:-55 **25** whatever? And hear what he says. If he says yes, that would

-16:-19:-55 **1** happen. Fine. Then I think you can -- you don't have an

-16:-19:-55 **2** inconsistent answer. He's acknowledged what he says.

-16:-19:-55 **3** MR. DOUGHTEN: So if we say five times and he says

-16:-19:-55 **4** three, can we play the tape to show what he didn't remember?

-16:-19:-55 **5** THE COURT: I suppose you can say: And how

00:33:56 **6** frequently did that occur? I don't know. Then let's play the

-16:-19:-55 **7** tape. The issue here is how he conducted the conversations and

00:34:12 **8** whether he did so in a way that with some frequency he

-16:-19:-55 **9** understood to direct the conversation to particular topics, then

-16:-19:-55 **10** see what he says. If he says yes, then you say: Isn't that

-16:-19:-55 **11** something that you did fairly frequently; for example, on May 5,

00:34:38 **12** whatever date it is, would you dispute the statement that you

00:34:44 **13** did that five times -- if he says -- in a three-minute or

00:34:50 **14** five-minute or eight-minute conversation? If he says, no, I

-16:-19:-55 **15** don't. Then fine, he's acknowledging doing it. At that point

00:35:02 **16** you want the defense case to show, ladies and gentlemen, this is

00:35:06 **17** what he did. He admitted he did this, now let's hear, and so

-16:-19:-55 **18** we can understand... At that point it's no longer

00:35:16 **19** cross-examination. You have asked him simply and plainly to

-16:-19:-55 **20** admit a fact. If he admits that fact, then when the case is

-16:-19:-55 **21** yours, you can elaborate on it. But I don't think at that

-16:-19:-55 **22** point, fine, now we're going to hear Mr. Griffin interjecting

-16:-19:-55 **23** five times. I think that's the defense side of the case.

00:35:40 **24** If he denies it -- it really is more how carefully

-16:-19:-55 **25** you craft your examination.

00:35:45 **1** MR. DOUGHTEN: I understand.

00:35:46 **2** THE COURT: You say, Mr. Griffin, would you dispute

-16:-19:-55 **3** that on May 5, you -- do you recall on May 5 having a

-16:-19:-55 **4** conversation from about 8:00, 10:00 p.m.? Yes, I do. In fact

00:36:01 **5** you played -- part of that conversation was played. It

-16:-19:-55 **6** involved X.

00:36:09 **7** MR. DOUGHTEN: We're fine with that, Your Honor.

-16:-19:-55 **8** THE COURT: And Mr. Griffin, do you recall at least

-16:-19:-55 **9** five times in that conversation you raised and interjected the

-16:-19:-55 **10** subject of X? I don't recall. Would it help if I were to

-16:-19:-55 **11** play for you that segment, those segments of the conversation?

-16:-19:-55 **12** I think at that point you can -- he said he doesn't recall. If

-16:-19:-55 **13** he says, yes, counsel, you're right.

00:36:40 **14** MR. SOFER: I'm with --

-16:-19:-55 **15** THE COURT: I'm afraid we're not going to be able

00:36:45 **16** to tell until I heard what the question is.

00:36:48 **17** MR. SOFER: The only question I have -- I tend to

-16:-19:-55 **18** agree with Your Honor about all of that. My next question,

-16:-19:-55 **19** though, would be under the I-don't-recall scenario, if we're

-16:-19:-55 **20** talking about a document, for instance, instead of a tape, the

00:37:02 **21** witness would be shown a copy of that document, the jury would

-16:-19:-55 **22** not. He would be asked: Does this reflect your recollection?

-16:-19:-55 **23** Then be given an opportunity to answer. When you have a tape,

-16:-19:-55 **24** for instance, or in a different situation --

-16:-19:-55 **25** THE COURT: Let me ask you this: Is it

00:37:19 **1** technologically possible for him and him alone, in other words,

-16:-19:-55 **2** to have it -- have him listen to it while the jury is still

00:37:28 **3** sitting here shuffling in and out?

-16:-19:-55 **4** MR. SOFER: I imagine what we would have to do is

00:37:35 **5** turn off --

00:37:36 **6** THE COURT: I understand we have kind of a closed

00:37:39 **7** transmission, or do you have a transcript of it?

00:37:44 **8** MR. SOFER: There are transcripts.

00:37:46 **9** MR. DOUGHTEN: We wouldn't have an objection if

00:37:49 **10** it's the transcript the government's supplied, we would not have

00:37:52 **11** an objection for him to use that to refresh his recollection.

00:37:56 **12** THE COURT: You could say: Mr. Griffin, page 16 to

-16:-19:-55 **13** page 24, would you please read that. Have you read it? Yes.

00:38:03 **14** MR. DOUGHTEN: We're fine with that, Your Honor.

-16:-19:-55 **15** THE COURT: And did you approximately five times,

-16:-19:-55 **16** Mr. Mazloun started saying something, and you, in response would

-16:-19:-55 **17** say this or something like this; is that correct? Yes, if he

-16:-19:-55 **18** says it's correct. Fine. Then if you want to play it in your

-16:-19:-55 **19** case, that's fine with me. If he says no, he didn't, after he'd

-16:-19:-55 **20** been looking at the transcript, then you could say, Judge -- and

-16:-19:-55 **21** I think I ought to have these transcripts so I know what's going

-16:-19:-55 **22** on. I'll visit up here. Are they in all the boxes you gave

-16:-19:-55 **23** me?

00:38:44 **24** MR. SOFER: They are. But you're going to have

00:38:47 **25** to -- you have to get from the defense, if we played a 20-minute

-16:-19:-55 **1** long segment and they want to cross-examine him on a two-minute
00:38:56 **2** long segment, you're going to have find that within --
00:38:59 **3** THE COURT: Are those all in chronological
00:39:01 **4** sequence?
00:39:02 **5** MR. SOFER: I did not prepare the box. I'd hate
-16:-19:-55 **6** to guess that. I certainly would hope so.
00:39:07 **7** MR. WITMER-RICH: Your Honor, you said, and then if
-16:-19:-55 **8** you would want to play it in your case, that would be okay.
-16:-19:-55 **9** That would then entail calling Mr. Griffin to the stand.
-16:-19:-55 **10** THE COURT: That is another issue.
-16:-19:-55 **11** MR. WITMER-RICH: It is indeed.
-16:-19:-55 **12** THE COURT: I think it probably would be. I
-16:-19:-55 **13** haven't -- I can see an issue and I don't know what the answer
00:39:24 **14** is, when you have two parties to a conversation, and your client
-16:-19:-55 **15** elects not to take the stand and testify, I suppose a way to do
00:39:35 **16** that, and I don't know, is -- I mean, after all, it's a question
-16:-19:-55 **17** of the admissibility of the tape. The tape is the evidence.
-16:-19:-55 **18** If they contend that the tape that you want to play -- I'm not
-16:-19:-55 **19** sure, why would we need anybody, the tape's already in evidence,
00:39:52 **20** why would we need have somebody --
00:39:57 **21** MR. WITMER-RICH: That's fine with me.
00:39:59 **22** THE COURT: If it's not evidence, it seems to me
00:40:02 **23** that matters of admissibility, the general rule is, are heard
-16:-19:-55 **24** outside the presence of the jury. And if your client -- if
-16:-19:-55 **25** there's a dispute -- first of all, I think we should probably

-16:-19:-55 **1** say to the government, do you agree this is a conversation on
-16:-19:-55 **2** May 16 between Mr. Amawi and Mr. Griffin at about this time?
-16:-19:-55 **3** I'm referring to the transcript, by the way. And, Your Honor,
00:40:22 **4** there is no dispute that this is the conversation; here's our
00:40:26 **5** version of the transcript or whatever. Ladies and gentlemen,
00:40:29 **6** we would like now to play for you what the parties agree. I
-16:-19:-55 **7** don't think your client has to take the stand. I'm not sure
00:40:36 **8** anybody has to take the stand. There's no dispute about the
00:40:42 **9** two people who are speaking.

-16:-19:-55 **10** MR. SOFER: We're not going to dispute 90 percent
-16:-19:-55 **11** of it.

-16:-19:-55 **12** THE COURT: There may be a Fifth Amendment issue.
00:40:50 **13** MR. WITMER-RICH: That certainly takes me a long
00:40:53 **14** way.

00:40:54 **15** MR. HARTMAN: I have several major problems with
-16:-19:-55 **16** this. It just goes to the fundamental fairness. The
-16:-19:-55 **17** government played tapes to this jury where you could hear the
00:41:06 **18** voices. Now, if we are confined when we get up to ask
-16:-19:-55 **19** questions, didn't this occur? Didn't you do that? The natural
00:41:17 **20** reaction of the jury is if you're saying he said this, then play
-16:-19:-55 **21** it. It gets to the point -- almost to the point we're afraid
00:41:24 **22** of these tapes and we're somehow keeping it -- they're saying,
-16:-19:-55 **23** why don't you play it so we hear?

00:41:30 **24** MR. IVEY: I'm sorry.

00:41:33 **25** THE COURT: At that point I can say to the jury,

-16:-19:-55 **1** ladies and gentlemen, there will come a time when the case is
-16:-19:-55 **2** with the defense when it gets to the defense and if they elect
-16:-19:-55 **3** to do so, they may play various tapes to which they are alluding
-16:-19:-55 **4** now. I think to the extent that they're thinking you're trying
-16:-19:-55 **5** to hide something, I can say, Oh, no, ladies and gentlemen.
00:41:56 **6** There will be a time and they're going to have an opportunity to
00:41:59 **7** play whatever they want. This is solely for the purpose of
-16:-19:-55 **8** determining if Mr. Griffin -- part of the purpose of
-16:-19:-55 **9** cross-examination is to raise questions about Mr. Griffin's
-16:-19:-55 **10** credibility.

00:42:13 **11** MR. HARTMAN: We have specific instances on the
-16:-19:-55 **12** recordings that go to his credibility that may not have been
00:42:24 **13** played by the government, may or may not -- actually, we have
00:42:27 **14** both: Some that were played by the government and some that
-16:-19:-55 **15** were part of the same recording but were not played by the
-16:-19:-55 **16** government.

-16:-19:-55 **17** Now, it sounds to me like the government's saying
-16:-19:-55 **18** we can't ask about those other ones.

-16:-19:-55 **19** MR. SOFER: I have never -- all the government has
-16:-19:-55 **20** said from the beginning, ask him on, cross-examine him until
-16:-19:-55 **21** their hearts are filled with cross-examination, but the fact of
-16:-19:-55 **22** the matter, as I said, this is not the first time this has
-16:-19:-55 **23** happened in a courtroom. There are certain procedures that
-16:-19:-55 **24** need to be followed, including the admission of hearsay,
00:43:04 **25** including the act of whether something extrinsic can come in

-16:-19:-55 **1** during cross-examination. I think this is -- this is black
00:43:12 **2** letter settled law. We're not saying that they can't
00:43:15 **3** cross-examine him. And if he gives an answer which then opens
-16:-19:-55 **4** the door for them to play certain tapes, we're not going to
00:43:23 **5** object to that either. It's just a question -- when we look at
-16:-19:-55 **6** what we've received, and the context in which a lot of this
-16:-19:-55 **7** stuff --

-16:-19:-55 **8** THE COURT: Part of the problem, each time I think
00:43:35 **9** we're going to get to a point we're going to talk about this in
00:43:38 **10** actual terms, we bump into the extraction. This morning we
-16:-19:-55 **11** were talking about it, and before, because nobody knew what the
00:43:48 **12** transcripts were, okay -- what the transcriptions were. Now as
-16:-19:-55 **13** we look at particular designations they've indicated they may
-16:-19:-55 **14** want to play during cross-examination or otherwise, you say,
-16:-19:-55 **15** well, wait a minute, if they're going to come in and play this
00:44:17 **16** in cross-examination, where's the cross-examination hook to let
-16:-19:-55 **17** that get dragged in now? And we don't know because counsel
-16:-19:-55 **18** said, we'll connect it up later, Judge. So we're going to have
-16:-19:-55 **19** to wait until later to see. And that's why --

-16:-19:-55 **20** MR. SOFER: Frankly, Judge, on that issue, as Mr.
-16:-19:-55 **21** Doughten said, it sort of is what it is, that the tapes aren't
-16:-19:-55 **22** changing; they're not living, breathing creatures. They are
00:44:52 **23** what they are. I don't think that we've -- I don't think
00:44:56 **24** there -- maybe I'm wrong, but I don't think there will be too
00:45:00 **25** many surprises on how they're going to use the tapes that

-16:-19:-55 **1** they've provided us to cross-examine the witness.

-16:-19:-55 **2** The one Your Honor has in front of you, the

-16:-19:-55 **3** concrete example you have in front of you, it's pretty clear, I

-16:-19:-55 **4** think, what the import of that is and where a defense attorney

-16:-19:-55 **5** would argue in that particular clip. Likewise, Your Honor --

-16:-19:-55 **6** THE COURT: Well, I assume, in this instance at

00:45:26 **7** least, Mr. Griffin, you had frequent contact with Agent Coats

00:45:30 **8** and the agents; is that correct? Yes. You reported to them

00:45:33 **9** frequently, didn't you? Yes. Practically every week. Yes,

-16:-19:-55 **10** you did. You had a conversation. It so happens -- and during

00:45:41 **11** that conversation, do you recall what you did and what,

00:45:46 **12** according to you, the defendant did? Yes. And you would give

-16:-19:-55 **13** advice and direction from the agent? Yes. And, in fact -- and

-16:-19:-55 **14** you would act in accordance with that advice and direction?

-16:-19:-55 **15** Yes.

-16:-19:-55 **16** What then? Then you want to play the tape, right?

00:46:18 **17** MR. IVEY: Yes, okay.

-16:-19:-55 **18** THE COURT: Then you can't object because there's

-16:-19:-55 **19** nothing inconsistent.

00:46:24 **20** MR. SOFER: Nothing inconsistent. The witness who

00:46:26 **21** he really wants to come after is the next witness, which is

-16:-19:-55 **22** Agent Coats.

00:46:31 **23** MR. IVEY: Let me interject a different example,

-16:-19:-55 **24** which I think more fits this case.

00:46:39 **25** THE COURT: Where are the enhanced tapes?

00:46:48 **1** THE VIDEO OPERATOR: It's in the computer.

00:46:51 **2** MR. HARTMAN: He's trying to find the right spot.

-16:-19:-55 **3** MR. SOFER: He found it. We have it cued up.

00:46:57 **4** THE COURT: Does somebody want to go off and talk

-16:-19:-55 **5** with him and see if you can't reach some agreement on the

00:47:04 **6** disputed issues?

00:47:06 **7** MR. SOFER: We need to meet with the Amawi team.

-16:-19:-55 **8** One of our team can go back.

-16:-19:-55 **9** THE COURT: Do you want to go back? You can go

-16:-19:-55 **10** back in the conference room if that helps. It's up to you.

-16:-19:-55 **11** MR. HARTMAN: Would it help to listen to it?

00:47:21 **12** THE COURT: Mr. Ivey was in mid-flight. The egg

-16:-19:-55 **13** to this chicken is getting the best audio, and then once we have

-16:-19:-55 **14** that, we can see what can be done with it.

00:47:49 **15** MR. SOFER: We'll give it a shot, Judge.

00:47:54 **16** MR. IVEY: Can I make a little different -- Let's

-16:-19:-55 **17** just assume in the case they had went out to a field

00:48:03 **18** periodically and put watermelons on a post and practiced

-16:-19:-55 **19** sniping.

00:48:10 **20** MR. HARTMAN: Cantaloupe.

00:48:16 **21** MR. IVEY: But every time that occurred, Mr.

-16:-19:-55 **22** Griffin -- in fact, the representation to the jury is the

-16:-19:-55 **23** defendants didn't want to do this, but Mr. Griffin just kept

-16:-19:-55 **24** asking, let's go, I set it up, let's shoot, let's shoot. They

00:48:31 **25** finally go out and snipe.

-16:-19:-55 **1** So if I ask Mr. Griffin, isn't it a fact that you
00:48:39 **2** introduced this every time, none of the co-defendants? And he
-16:-19:-55 **3** says, No; no, it wasn't my original idea; it was Mr. Amawi's
-16:-19:-55 **4** idea; it was Mr. El-Hindi's idea. At that point I think in
-16:-19:-55 **5** fairness we should be able to play repeated examples of where
00:48:59 **6** he's doing this.

-16:-19:-55 **7** THE COURT: I would agree. However you conduct
00:49:05 **8** the examination, we get to the point where he either
00:49:10 **9** acknowledges or repudiates the contention that you would raise
-16:-19:-55 **10** the issue of going shooting, and you would do this frequently.
-16:-19:-55 **11** And, in fact, on these days you did this. And if he says,
00:49:29 **12** "Yes, I did," he acknowledges each and every time, then I don't
-16:-19:-55 **13** see the need to play the tapes. If he says: No, I didn't -- I
00:49:41 **14** can't -- I can't project how you're going to do your
00:49:45 **15** cross-examination. You might do it entirely differently. You
00:49:51 **16** know a lot more of it than I have. I've sat up here and watched
-16:-19:-55 **17** it.

00:49:56 **18** MR. IVEY: The other point is this repeated concern
-16:-19:-55 **19** about hearsay. A lot of it -- I'll speak to our tape, our
-16:-19:-55 **20** client is obviously speaking on them, but it would be hearsay.
-16:-19:-55 **21** The comments by the client have to assert a fact. A lot of
00:50:10 **22** times he's asking a question or saying, uh-huh, uh-uh. So
00:50:14 **23** that's not really hearsay if he's not -- if we want to play a
00:50:19 **24** clip where a client says, "The last thing in the world I ever
-16:-19:-55 **25** want to do is go into Iraq and kill soldiers," obviously that's

-16:-19:-55 **1** hearsay. But if our client is saying, you know: Do you want
-16:-19:-55 **2** something to drink? That's not hearsay. So I think I'm just
-16:-19:-55 **3** kind of concerned about this global argument that these tapes
00:50:40 **4** are hearsay unless we play them. I think you have to look at
00:50:44 **5** what is being said.

00:50:45 **6** THE COURT: I agree. I was hoping you would be
-16:-19:-55 **7** able to do that tonight and tomorrow and get that underway and
00:50:52 **8** get things moving.

-16:-19:-55 **9** MR. SOFER: But, Judge, just to respond quickly,
-16:-19:-55 **10** two things. Again, the government has no problem with the
00:51:01 **11** cross-examination; the government has no problem with
-16:-19:-55 **12** confronting the witness the way you confront a witness with a
-16:-19:-55 **13** document, giving him a chance to essentially impeach the witness
-16:-19:-55 **14** with the document. If he continues to deny something that is
-16:-19:-55 **15** not in some way -- as long as it's material, then the jury can
00:51:23 **16** hear it. I don't dispute that either. But it is true,
-16:-19:-55 **17** defense may not like it, but it is true that their clients'
00:51:36 **18** out-of-court statements on these tapes are hearsay. Unless
-16:-19:-55 **19** there is a particular either exception or reason why they're
00:51:46 **20** not.

-16:-19:-55 **21** THE COURT: Or they're simply there and the
-16:-19:-55 **22** evidence is that they were made. They're not for the truth of
-16:-19:-55 **23** the matter asserted, then they're not hearsay.

-16:-19:-55 **24** MR. SOFER: If there's no communicative value to
-16:-19:-55 **25** them, then sure. But that's not what we have here. And I can

-16:-19:-55 **1** tell you that there are gobs of substantive communications in
00:52:09 **2** the proposed segments that the defense has put forward. In
-16:-19:-55 **3** fact, again, I have -- we have examples of this here in court --
00:52:19 **4** THE COURT: Okay, let's take a look at them.
00:52:22 **5** MR. SOFER: -- where I think it's fairly clear that
00:52:26 **6** the -- here's an example. I'll show it to Counsel first. Very
00:52:41 **7** short. I'm picking it because it's short.
00:57:05 **8** (Recess taken.)
-16:-19:-55 **9** THE COURT: We're back on the record. That's
-16:-19:-55 **10** fine. But that's your case, not cross-examination. You can
-16:-19:-55 **11** bring out with Griffin that he employed certain techniques.
-16:-19:-55 **12** And you have a road map to that, I suspect, in your expert's
00:57:30 **13** report. And raising subjects, returning subjects, ignoring
00:57:39 **14** responses, taking your direction from your conversation with the
00:57:46 **15** agents, and if he says, yes, he did, that's fine. And I think
-16:-19:-55 **16** that's an appropriate line of inquiry for him about his own
-16:-19:-55 **17** conduct and how he acted. If he acknowledges that's what he
-16:-19:-55 **18** did, then fine, that's as far as I think you can go on
00:58:06 **19** cross-examination. And I think it's fair to inquire about his
-16:-19:-55 **20** overall role and what he was trying to accomplish if that's
00:58:16 **21** where you're going to go, because he's talked about gathering
-16:-19:-55 **22** intelligence and so forth.
-16:-19:-55 **23** The question is, as part of that, even assuming you
-16:-19:-55 **24** get honest answers from him on cross-examination or
00:58:36 **25** acknowledgment as to your description of what was going on,

-16:-19:-55 **1** either specific instances or overall, can you then turn around
-16:-19:-55 **2** and play a lot of tapes showing that is so? And I don't think
00:58:47 **3** you can. I think you can in your own case. Ladies and
00:58:50 **4** gentlemen, you've heard Mr. Griffin acknowledge on
00:58:53 **5** cross-examination, but that's only part of the story. Let's
-16:-19:-55 **6** listen to what you haven't heard so you get the full story, then
00:59:01 **7** you'll see how extensive and repeated this is.

00:59:04 **8** MR. HARTMAN: Is the Court's opinion based on the
-16:-19:-55 **9** fact that that's just the limit of the cross-examination or the
00:59:09 **10** hearsay issue that the government's been talking about or some
-16:-19:-55 **11** combination of two?

00:59:15 **12** THE COURT: I'm talking about subject matter
00:59:18 **13** without reference to hearsay contentions. I just don't know.
-16:-19:-55 **14** This little snippet that was just shown, it seems to me that's
00:59:31 **15** hearsay if it's offered to show -- if it's offered to prove that
-16:-19:-55 **16** anybody could go and get these websites, clearly hearsay.
00:59:42 **17** Okay. And it's also -- it verges on opinion evidence. It's not
-16:-19:-55 **18** a qualified opinion, so it's not admissible on that basis
00:59:54 **19** either.

-16:-19:-55 **20** MR. HARTMAN: I don't disagree. Some of what we
-16:-19:-55 **21** will try to cross-examine on the government will argue is
-16:-19:-55 **22** hearsay and we will argue an exception applies and we'll have to
-16:-19:-55 **23** deal with that. We're going to have to deal with that as we
-16:-19:-55 **24** go.

01:00:06 **25** MR. SOFER: But I think the purpose of doing all of

-16:-19:-55 **1** this, Judge, is to try to not have to deal with it in a million

-16:-19:-55 **2** sidebars, that's all.

-16:-19:-55 **3** THE COURT: I agree. We may not be able to get

-16:-19:-55 **4** away with that.

-16:-19:-55 **5** MR. IVEY: Again, Mr. Sofer, I have a book here of

-16:-19:-55 **6** largely all the excerpts I'm going to use. None of these

01:00:25 **7** examples he's putting up here are ones I'm going to use.

01:00:28 **8** THE COURT: Time out.

01:00:29 **9** MR. IVEY: So what I'm suggesting --

01:00:32 **10** THE COURT: Time out.

01:00:33 **11** I'm in a good mood today. Don't ask me why.

-16:-19:-55 **12** Don't push it with the interruptions. When I'm saying time

01:00:42 **13** out -- maybe I should get a referee's whistle.

-16:-19:-55 **14** I agree. You guys are going to talk. Tomorrow

01:00:52 **15** morning or whatever we'll start off by saying where there's

-16:-19:-55 **16** disagreement. And so there may be less to worry about, Mr.

-16:-19:-55 **17** Sofer, as Mr. Ivey is suggesting that there is.

01:01:10 **18** Has anybody been listening to the enhanced tape?

01:01:13 **19** MR. SOFER: We have it keyed up, Your Honor. All

-16:-19:-55 **20** I can say about this, if I may respond to this, is, jeez, I wish

-16:-19:-55 **21** we had known when we spent days and hours and took our people in

-16:-19:-55 **22** on the weekend that these were not the segments that Counsel

-16:-19:-55 **23** was -- I go back to, Judge, all the government's ever asked here

-16:-19:-55 **24** is for fairness. I hazard to say this, but had the government

-16:-19:-55 **25** done some of these things, I think we would be in a much

01:01:39 **1** different position, the yelling and screaming and concerns on
-16:-19:-55 **2** their side would have been through the roof and I even fear that
01:01:46 **3** the Court would treat us with a great deal more harshness than
-16:-19:-55 **4** the kind of -- we're going to roll with these punches, we will
-16:-19:-55 **5** continue with these punches. All we're asking for is to play
-16:-19:-55 **6** by the rules. I don't think that's an unfair request.
01:02:04 **7** MR. WITMER-RICH: Your Honor, we worked very hard.
01:02:06 **8** THE COURT: Time out. Everyone works very hard.
01:02:13 **9** Let's see if there is an enhanced tape on that passage we
01:02:20 **10** started out with an hour ago.
-16:-19:-55 **11** MR. HARTMAN: Yes, there is.
-16:-19:-55 **12** THE COURT: How are we going to be listening to it,
01:02:25 **13** with earphones?
01:02:27 **14** MR. SOFER: My recommendation is to listen to it as
-16:-19:-55 **15** the jury would, with using the headphones and the Court system.
01:02:35 **16** THE COURT: Can we start a little further before we
01:02:39 **17** get to the passages? It takes me a while to pick up the flow.
01:02:44 **18** MR. WITMER-RICH: So Your Honor knows, I haven't
01:02:47 **19** listened to this section. Sometimes the enhanced audio brings
-16:-19:-55 **20** out more things. Sometimes the enhancement simply causes more
-16:-19:-55 **21** background noise. So we make no representation about whether
01:02:57 **22** this enhanced version will pick up this particular section, but
01:03:01 **23** we'll give it a shot.
01:03:03 **24** THE COURT: But this is a different segment than we
-16:-19:-55 **25** had before?

01:03:06 **1** MR. HARTMAN: No.

01:03:08 **2** MR. WITMER-RICH: The same segment that's been

01:03:11 **3** enhanced.

-16:-19:-55 **4** MR. HARTMAN: It's longer. There's more of it.

-16:-19:-55 **5** MR. SOFER: You can see, Your Honor, the part

-16:-19:-55 **6** that's in play here is the last statement of Agent Coats where

-16:-19:-55 **7** it says, "Uh" and it's the unintelligible, the UI, rides out

01:03:26 **8** there. The third line up from the bottom of the blue. It

-16:-19:-55 **9** says, Agent Coats: "Uh"; then it's unintelligible.

01:03:35 **10** THE COURT: We're going to start with UI detail,

-16:-19:-55 **11** tell me, tell me.

01:03:41 **12** THE VIDEO OPERATOR: Approximately, yes.

01:03:48 **13** MR. BOSS: That's static.

01:03:55 **14** (Enhanced audio version played.)

01:04:24 **15** THE COURT: I hear less.

01:04:28 **16** MR. WITMER-RICH: That's worse.

01:04:30 **17** THE COURT: If that's enhanced --

-16:-19:-55 **18** MR. SOFER: We have some knowledge of this also.

-16:-19:-55 **19** We tried to enhance some of these tapes. Depending on which

-16:-19:-55 **20** sort of on the equalizer of different sounds that you pitch up

-16:-19:-55 **21** and push down, it sometimes brings out certain things and

01:04:48 **22** sometimes it kills things. This one sounds like it killed more

-16:-19:-55 **23** than helped.

-16:-19:-55 **24** THE COURT: Well, what can we do?

01:04:57 **25** MR. SOFER: Again, Judge, I think Your Honor can

-16:-19:-55 **1** listen to the tapes that we have, and if you hear it, you hear
01:05:04 **2** it. If you don't, it should be labeled as inaudible. Again,
01:05:10 **3** that's what an audibility hearing is. Unless the defense
-16:-19:-55 **4** and/or the Court have another way of presenting this evidence to
-16:-19:-55 **5** the jury, again, we don't hear what they've put on that piece of
01:05:21 **6** paper.
01:05:22 **7** THE COURT: I certainly didn't hear it then.
01:05:24 **8** MR. SOFER: And maybe there's another word or two
-16:-19:-55 **9** that could be added. I don't know. We are willing to have the
01:05:32 **10** Court make this determination based on the evidence that is
-16:-19:-55 **11** before it.
01:05:37 **12** MR. WITMER-RICH: The Court earlier, after
01:05:39 **13** listening to the original version, thought you could make out
-16:-19:-55 **14** the words "push them". That's probably the phrase we're
-16:-19:-55 **15** looking for.
01:05:49 **16** THE COURT: I could hear "push" and "there." I
-16:-19:-55 **17** didn't hear the rest of it, whatever that small print was.
01:06:19 **18** We're looking at the smallest fraction, right?
-16:-19:-55 **19** MR. SOFER: In some ways it's a testament when
-16:-19:-55 **20** we're on this much minutiae. But the Court can listen. We can
-16:-19:-55 **21** play it again and again if you want. We can put this one behind
01:06:43 **22** us. Alternatively, I mean, again, I'm willing to sit down with
01:06:48 **23** Counsel, and they can help us hear something. As Your Honor
-16:-19:-55 **24** pointed out, I don't think either side is behooved by trying to
-16:-19:-55 **25** either hear something that's not there or not hear something

-16:-19:-55 **1** that is there. I just -- I think -- would hope we'd all be
01:07:08 **2** interested in getting truth out.

-16:-19:-55 **3** THE COURT: Give me a minute, please.

01:08:42 **4** THE COURT: Well, it's my understanding the

-16:-19:-55 **5** Wilkinson case, 53 F.3d 762, Sixth Circuit 1995, the Court held

01:09:05 **6** that where the parties disagree about the content of purported

-16:-19:-55 **7** conversations and desires to submit a transcript to assist the

01:09:12 **8** Court and jury, if the parties cannot agree the Court should

01:09:15 **9** compare the tape to the government's transcript and determine

-16:-19:-55 **10** whether it fairly and accurately reflects the content of the

-16:-19:-55 **11** recording. If both parties submitted transcripts, the Court

-16:-19:-55 **12** should compare them with the recordings to determine the more

-16:-19:-55 **13** reliable version. When it's done so -- this may not be Sixth

-16:-19:-55 **14** Circuit law, this part, where it's done so -- should make a

-16:-19:-55 **15** finding on the record about which transcript actually accurately

01:09:52 **16** reflects the contents of the recorded conversation.

01:10:11 **17** MR. WHITMER-RICH: Would Your Honor like to listen

-16:-19:-55 **18** to it on the laptop computer with earphones?

-16:-19:-55 **19** THE COURT: The only thing, I should listen to it

-16:-19:-55 **20** only in the transmission mode that the jury's going to hear.

-16:-19:-55 **21** It does me no good if I go to the electronic research facility

-16:-19:-55 **22** down in Quantico and the FBI has this all these tweeters and

-16:-19:-55 **23** woofers, and we can hear every pin drop, that's not what the

01:10:38 **24** jury's going to hear. That's the problem. If there is a way

-16:-19:-55 **25** to transmit it to the jury -- it doesn't have to be a scrolling

01:10:46 **1** thing, if they have the transcript the old fashioned way and you
-16:-19:-55 **2** play it and they read it, every juror has a copy in his or her
-16:-19:-55 **3** hands, that's fine. But it's got to be -- the recording that
-16:-19:-55 **4** they hear has to be sufficiently audible.

01:11:10 **5** MR. HARTMAN: Your Honor, I think that makes sense
-16:-19:-55 **6** for whatever hasn't been played already, but I think maybe we
-16:-19:-55 **7** need to come up with another workable solution for the
01:11:22 **8** transcripts the government's already shown to the jury because I
-16:-19:-55 **9** mean the impression -- I don't think we have a ton of
-16:-19:-55 **10** disagreements with those, but we did have some, and the
01:11:35 **11** impression was that -- about the Court kept admonishing the
-16:-19:-55 **12** jury, look, those aren't evidence. The impression was we were
01:11:42 **13** going to be able to put our transcripts in. I don't want to
-16:-19:-55 **14** make it harder to find a solution, but that's --

01:11:51 **15** MR. SOFER: I go back to, Judge, we have stood up
01:11:58 **16** here for months saying if you've got problems with our
-16:-19:-55 **17** transcripts, please bring them to our attention. In fact, we'd
-16:-19:-55 **18** be more than happy to fix them. That bell never rang. That
-16:-19:-55 **19** does not -- again, I do not believe that that opens the door for
01:12:12 **20** the jury to hear the transcript -- it depends, of course, but I
01:12:18 **21** think largely that does not open some giant door, the fact that
-16:-19:-55 **22** they sat back essentially, waited until we're in the midst of
-16:-19:-55 **23** trial to voice an objection to the government's transcripts,
-16:-19:-55 **24** does not then allow them also then to walk through that door and
-16:-19:-55 **25** play for the jury some new transcript that essentially puts the

-16:-19:-55 **1** jury in the mindset of: Well, what's going on here, how many
01:12:51 **2** transcripts are there going to be about this? Again, maybe
-16:-19:-55 **3** there's not that much to dispute.

-16:-19:-55 **4** THE COURT: I think that's the first thing that has
-16:-19:-55 **5** to be found out. And I do think, when you start with what Mr.
-16:-19:-55 **6** Amawi said, are you in a position with regard to the audibility
01:13:09 **7** questions to sit down with the government and determine whether
-16:-19:-55 **8** or not you can reach some agreement as to some of these disputed
01:13:19 **9** passages.

01:13:20 **10** MR. WITMER-RICH: Is this the only one with regard
01:13:22 **11** to the clips?

-16:-19:-55 **12** MR. SOFER: No, we have eight or nine examples.
-16:-19:-55 **13** The second I think -- I think it's nine examples where we -- by
-16:-19:-55 **14** the way, I should note, we've not had an opportunity to listen
-16:-19:-55 **15** to all of these, particularly if they're outside of what we've
-16:-19:-55 **16** already presented in court. So it's possible there will be
01:13:41 **17** more of these in the next day or so, or two days. The
-16:-19:-55 **18** government is moving as quickly as we can, given the fact we
-16:-19:-55 **19** just received these things, but we have examples here in court,
-16:-19:-55 **20** about eight or nine of them. For the most part, Judge, when
-16:-19:-55 **21** they've said an A is a, the, or something where we deem it to be
01:14:00 **22** inconsequential. I would dispute what Counsel said about
-16:-19:-55 **23** whether everything somebody says is inconsequential. We've
-16:-19:-55 **24** just said, okay, fine, let them; if it's an/and, a/the, e/we --
-16:-19:-55 **25** we don't care. It's only the places we've seen a substantive

-16:-19:-55 **1** difference that we've pulled them aside. So I'm happy to sit
-16:-19:-55 **2** down; if we end up being able to agree on most of this, I don't
-16:-19:-55 **3** think it's going to be an issue.
-16:-19:-55 **4** I don't know whether we can agree on this last one.
-16:-19:-55 **5** Maybe you can hear a push and another word. I asked, again,
01:14:31 **6** our team. I would stand up any day in court and say these guys
-16:-19:-55 **7** are not playing a game here, Judge; they are honestly saying
01:14:40 **8** things; that is not what the government is saying. So maybe we
-16:-19:-55 **9** can reasonably work this out. I'm not concerned so much
-16:-19:-55 **10** about -- I thought we could do this quickly. Apparently not.
01:14:54 **11** I'm not so concerned about these actually. I think for the
01:14:57 **12** most part we will be able to work these out. To me it's
01:15:00 **13** obvious one of the reasons the government is so eager to have
-16:-19:-55 **14** Your Honor listen to this is I'm confident we're right with
-16:-19:-55 **15** respect to the ones that we've picked.
01:15:09 **16** THE COURT: Question. Do one of two things: One,
-16:-19:-55 **17** we can simply play them now. And maybe that's the thing to do.
-16:-19:-55 **18** At least with the Amawi tapes.
01:15:21 **19** MR. SOFER: We're prepared to do that right now.
-16:-19:-55 **20** MR. IVEY: I would propose, before we do that, if I
-16:-19:-55 **21** could take ten minutes. I'm concerned Mr. Sofer is concerned
-16:-19:-55 **22** about an excerpt I'm not going to use.
-16:-19:-55 **23** MR. SOFER: That's fair also. Again, I wish we
-16:-19:-55 **24** had known this before, but we're happy to pick them out.
-16:-19:-55 **25** THE COURT: Why don't you do that. And then I

-16:-19:-55 **1** will make a credibility determination as to those excerpts that
01:15:47 **2** are still in dispute as to the Amawi tapes.

-16:-19:-55 **3** What about with the Mazloun tapes, are there any
-16:-19:-55 **4** that you anticipate an audibility --

01:15:58 **5** MR. DOUGHTEN: We have no issues at all in the
-16:-19:-55 **6** tapes we intend to use.

-16:-19:-55 **7** THE COURT: Okay. And then what I would propose
-16:-19:-55 **8** doing is -- are all your tapes in the government's hands for
-16:-19:-55 **9** Mr. El-Hindi, the transcripts?

01:16:14 **10** MR. HARTMAN: The excerpts that we intend to play
-16:-19:-55 **11** are not all in the government's hands. There are about four or
-16:-19:-55 **12** five recordings that still need to go to the government.

-16:-19:-55 **13** THE COURT: When is it that you propose, at what
-16:-19:-55 **14** point in your cross-examination do you expect to get to them?

01:16:33 **15** MR. HARTMAN: It's late.

01:16:34 **16** THE COURT: So the question finesses that by saying
01:16:36 **17** we can at least look at the initial stuff, right?

-16:-19:-55 **18** MR. HARTMAN: Yes.

01:16:41 **19** THE COURT: So what I would propose doing is you
-16:-19:-55 **20** and Mr. Ivey talk with each other, see if you can cut away some

01:16:51 **21** underbrush, and then we will -- I will do the audibility as to

-16:-19:-55 **22** those that remain in dispute, and at that point I'm not sure

01:17:07 **23** there's much more we can do. I've tried to outline in general

01:17:11 **24** what I think is going to be permissible cross-examination, but

01:17:16 **25** my uninformed anticipation based upon how I, if I were a defense

-16:-19:-55 **1** lawyer, might view something, is not a fair basis to start
01:17:29 **2** making rulings. We'll have to deal with that one by one. I
01:17:34 **3** tried give some general guidance. We're going to have to wait
-16:-19:-55 **4** until Wednesday morning to start doing it.

-16:-19:-55 **5** MR. SOFER: Here's my only concern about that,
-16:-19:-55 **6** Judge.

01:17:46 **7** THE COURT: I don't want to, but I don't know how
01:17:48 **8** else to proceed.

-16:-19:-55 **9** MR. SOFER: The practicalities of this are we all
01:17:53 **10** know that when the government jumps up 36 times during the
01:17:58 **11** cross-examination of its main witness that that's not
-16:-19:-55 **12** necessarily tactically the best way of going about allowing for
01:18:08 **13** cross-examination. I don't want -- again, my concern is always
01:18:11 **14** just to ensure that the government is not prejudiced here.
-16:-19:-55 **15** Without at least the contours of this being set out early, we're
-16:-19:-55 **16** going to be stuck in a position where, Your Honor -- and I mean
01:18:23 **17** nothing negative, Your Honor -- has occasionally objected to the
01:18:27 **18** government's questions for hearsay -- on hearsay grounds or
01:18:32 **19** other grounds. I would ask the Court in the same vein to
-16:-19:-55 **20** consider our position at least then, at least liberally think
-16:-19:-55 **21** about the notion that I don't want to be jumping up out of the
-16:-19:-55 **22** seat 46 times a day. I don't think that's a good move by the
-16:-19:-55 **23** government.

01:18:49 **24** THE COURT: Mr. Getz can jump up, Mr. Hartman.

01:18:54 **25** MR. SOFER: He might jump on me. That's the

-16:-19:-55 **1** problem. We don't want to be in that position.

-16:-19:-55 **2** THE COURT: I understand. Well, maybe some of

01:19:00 **3** this will get cleaned up once you see what excerpts will be

-16:-19:-55 **4** offered, too.

-16:-19:-55 **5** MR. HARTMAN: Your Honor, we also made an offer to

-16:-19:-55 **6** meet with the government tomorrow to try to go over our excerpts

01:19:10 **7** to try to come up with whatever agreement we can. We feel that

-16:-19:-55 **8** as --

-16:-19:-55 **9** THE COURT: Can you, depending upon how far we go,

01:19:17 **10** still get together tonight? Can you try to do some of that this

-16:-19:-55 **11** evening?

01:19:23 **12** MR. HARTMAN: With the government or with you?

01:19:25 **13** THE COURT: The government. I'd like to show up

01:19:27 **14** sometime tomorrow with knowing really what is at issue, so we

-16:-19:-55 **15** don't spend an hour, two hours, five hours, eight hours fumbling

-16:-19:-55 **16** around because nobody, the government in particular, doesn't

01:19:41 **17** know what it is you really intend to offer.

-16:-19:-55 **18** MR. HARTMAN: Yes, we can do some of that with the

-16:-19:-55 **19** government tonight.

01:19:48 **20** THE COURT: At least get started on that so we can

01:19:50 **21** get through this week, up to this weekend, without every little

-16:-19:-55 **22** excerpt taking ten minutes of side bar.

01:20:03 **23** MR. HARTMAN: We can definitely start that with the

-16:-19:-55 **24** government tonight when they get finished with whatever -- Mr.

01:20:10 **25** Sofer has my cell phone. When they get done with Amawi. One

-16:-19:-55 **1** thing that might help us is if the Court is going to make a
01:20:17 **2** blanket ruling on cross-examination of Mr. Griffin based on
01:20:21 **3** incidents that are outside of the alleged time of the
-16:-19:-55 **4** conspiracy, if they have been mentioned.

01:20:32 **5** THE COURT: They are what?

01:20:39 **6** MR. BOSS: Your Honor, there are a number of
01:20:42 **7** matters that concern Zubair and Khaleel Ahmed. Those are the
-16:-19:-55 **8** young fellows from Chicago, who are shown to the jury on the
-16:-19:-55 **9** initial exhibit there as co-conspirators in this indictment,
-16:-19:-55 **10** actually separated out now. Now, we have a lot of evidence
01:21:03 **11** that's already come in through the government pertaining to
01:21:07 **12** Mr. El-Hindi and Mr. Griffin talking about El-Hindi having gone
-16:-19:-55 **13** to Cairo and I saved those boys, I brought them back, and so
-16:-19:-55 **14** forth.

01:21:18 **15** MR. HARTMAN: And training them.

-16:-19:-55 **16** MR. BOSS: And there's training issues that have
01:21:22 **17** filtered into that. Now, what the government didn't play since
-16:-19:-55 **18** it started on the date of the alleged conspiracy started was
-16:-19:-55 **19** another year or more of comments between Mr. Griffin and
-16:-19:-55 **20** Mr. El-Hindi pertaining to what Mr. El-Hindi thought about these
-16:-19:-55 **21** boys and wanted to do with them. And we believe that that is
01:21:41 **22** appropriate examination of Mr. Griffin because it demonstrates
-16:-19:-55 **23** an inconsistency between the segments that were played for the
-16:-19:-55 **24** jury. It gives life to those when Mr. Griffin says we have to
-16:-19:-55 **25** train them, what he's not saying is what his understanding with

01:22:06 **1** Mr. El-Hindi is that they are training them for; that came from
01:22:10 **2** these other tapes. There are a wealth of different examples of
-16:-19:-55 **3** what they would be training them for.

01:22:17 **4** THE COURT: In other words, what you're saying is
-16:-19:-55 **5** the prior -- it's in a sense completeness.

01:22:26 **6** MR. BOSS: Yes.

-16:-19:-55 **7** THE COURT: You are saying the prior conversation
-16:-19:-55 **8** needs to be inquired into and perhaps even played for the jury
01:22:32 **9** depending on whether its content is admitted or acknowledged or
-16:-19:-55 **10** not. Because if these people were on the same football team and
01:22:44 **11** they had come to mean -- the phrase "in training" meant you
01:22:49 **12** didn't smoke or drink during football season and now it's later,
-16:-19:-55 **13** are you in training or not, yes, we are, i.e., although it's two
-16:-19:-55 **14** years later and they're not playing football anymore, that was
-16:-19:-55 **15** code for them to say we aren't smoking or drinking.

01:23:09 **16** MR. BOSS: The prior conversations give context to
-16:-19:-55 **17** the later words that are used, and mental state.

01:23:16 **18** MR. HARTMAN: And what they mean.

01:23:19 **19** MR. SOFER: Two things here, Judge. As far as the
01:23:27 **20** government knows, the first time these two individuals were
-16:-19:-55 **21** mentioned at all by Darren Griffin was at or near the time we
-16:-19:-55 **22** put the evidence in.

01:23:38 **23** Number 2, once again, if Counsel wants to put in
01:23:43 **24** evidence of prior conversation, prior to the actual charges in
-16:-19:-55 **25** this case that are innocent, I don't think they get to do that.

01:23:55 **1** Even if we credit what I think is wrong.

-16:-19:-55 **2** THE COURT: I think that if that is a way that

-16:-19:-55 **3** their cross-examination goes, I can see that it's a -- it's fair

01:24:10 **4** to say, Mr. Griffin, you used the word training in talking to

-16:-19:-55 **5** Mr. El-Hindi during this time period; you had used that term

01:24:17 **6** previously with him, had you not? He says, no. Then you say:

-16:-19:-55 **7** Well, wait a minute, take a look at this transcript during this

-16:-19:-55 **8** period. Yes, I had. And, Mr. Griffin, was the context not --

-16:-19:-55 **9** which you were using that term at that time was different than

-16:-19:-55 **10** the context that you later used it with him, or was it the same?

01:24:43 **11** It seems to me if two parties develop an

01:24:49 **12** understanding about a particular subject prior to the pertinent

01:24:57 **13** period, it's appropriate to almost kind of a 404(b) kind of

-16:-19:-55 **14** sense it to, it's a similar act. They're going to show that --

-16:-19:-55 **15** they're going to at least ask him whether or not the usage

01:25:18 **16** somehow varied or remained the same, I suppose.

-16:-19:-55 **17** MR. SOFER: I don't necessarily disagree with that.

-16:-19:-55 **18** Maybe Counsel will show us, once again, what they're talking

-16:-19:-55 **19** about and maybe that will change the government's view. I

-16:-19:-55 **20** don't think so.

01:25:32 **21** THE COURT: At least as they now project it, I

-16:-19:-55 **22** think at least on that subject it's appropriate, depending on

-16:-19:-55 **23** how the answers go. If he says yeah, sure, we were talking

-16:-19:-55 **24** about training for football; I was talking about training for

-16:-19:-55 **25** guns. At least they've laid a predicate then for he's admitted

-16:-19:-55 **1** that there were different usages, then when it's their case they
-16:-19:-55 **2** can either, through Mr. El-Hindi or otherwise, undertake to show
-16:-19:-55 **3** or just use a series of tapes and so forth: You're still
-16:-19:-55 **4** talking football, you're not talking, whatever? But again,
-16:-19:-55 **5** it's very hard for me -- I think, Mr. Boss and Mr. Hartman, I've
01:26:16 **6** answered your question: No, I'm going to at least let you head
-16:-19:-55 **7** in that direction. I'm not saying simply it's outside their
01:26:26 **8** time frame it necessarily is automatically -- let me, so I know
-16:-19:-55 **9** what we're talking about...
-16:-19:-55 **10** What is the commencement date of the conspiracy?
01:26:37 **11** MR. SOFER: June of 2004, either late May or early
01:26:45 **12** June of 2004.
01:26:46 **13** THE COURT: I feel a whole lot less embarrassed to
-16:-19:-55 **14** see you have a degree of uncertainty. I'm teasing. I'm sitting
01:27:02 **15** up here thinking: Gee, can I admit I don't know the date?
01:27:05 **16** MR. SOFER: It was shortly before the meeting
01:27:08 **17** between Zubair and Khaleel Ahmed and Marwan El-Hindi.
01:27:14 **18** THE COURT: The Cleveland trip?
01:27:16 **19** MR. SOFER: Correct.
-16:-19:-55 **20** THE COURT: That was early summer of '04?
01:27:20 **21** MR. SOFER: It was mid-summer, this meeting was.
01:27:22 **22** Of course, the indictment charges the conversations that
01:27:25 **23** preceded.
01:27:26 **24** THE COURT: When did El-Hindi and Griffin -- when
01:27:30 **25** did they first meet?

01:27:31 **1** MR. HARTMAN: They started speaking in late '01 or
-16:-19:-55 **2** '02. Griffin started recording him in '02, early '03.

01:27:41 **3** MR. SOFER: I believe the testimony was because
01:27:47 **4** Marwan El-Hindi was in the company of other persons of interest,
-16:-19:-55 **5** I believe that was the person of Mr. Griffin.

01:28:01 **6** MR. SOFER: Mr. Getz asked the question, and it's
01:28:04 **7** one that, of course, the government has, too; I mean that I have
-16:-19:-55 **8** as well, Your Honor, which is the -- if Counsel is alleging
-16:-19:-55 **9** specific conversations prior to June of '04 related to Zubair
-16:-19:-55 **10** and Khaleel Ahmed, that would be different, I think, than just
-16:-19:-55 **11** general conversations between Marwan El-Hindi and the
-16:-19:-55 **12** government's cooperating witness, whether they talked about
01:28:32 **13** training.

-16:-19:-55 **14** THE COURT: I will only say that probably the way
-16:-19:-55 **15** to handle this, at least a possible way is: Number one, you
-16:-19:-55 **16** give a head's up to the government the night before you intend
01:28:46 **17** to use this stuff so you can talk about it, so you at least have
-16:-19:-55 **18** some sense, at the break or whatever. I mean, I'm going to --
-16:-19:-55 **19** I think I would be looking to you to say: Judge, this is why
01:28:59 **20** it's outside the trial frame of the conspiracy of the case. I
-16:-19:-55 **21** think it's proper cross-examination. The kind of explanation
-16:-19:-55 **22** Mr. Boss just had.

-16:-19:-55 **23** MR. HARTMAN: We will tell the Court where we're
-16:-19:-55 **24** going, we'll give the government an indication of where we're
-16:-19:-55 **25** going, based on what I -- our defense asks. The entire period

01:29:21 **1** based on Griffin's conduct is very important as to whether an
-16:-19:-55 **2** agreement was ever reached or intent was there in the
-16:-19:-55 **3** distribution, the entire period is important.

-16:-19:-55 **4** THE COURT: But, again, there's a distinction
-16:-19:-55 **5** between cross-examination and your case.

01:29:34 **6** MR. HARTMAN: There is. I'll try not to forget
01:29:38 **7** that.

01:29:39 **8** MR. IVEY: I have a question because I'm still
01:29:41 **9** unclear. I just want to understand. What, the extent of the
01:29:45 **10** parameters of cross-examination, if we use the government's
01:29:48 **11** transcript that the government introduced in direct, is that
01:29:54 **12** fair game to run up and ask questions of Mr. Griffin regarding
-16:-19:-55 **13** his conduct and his statements of the transcript the government
-16:-19:-55 **14** used?

-16:-19:-55 **15** THE COURT: I would assume. I can't imagine why
-16:-19:-55 **16** not.

01:30:07 **17** MR. IVEY: I just wanted to make that clear.

-16:-19:-55 **18** THE COURT: If you take the transcript away and
-16:-19:-55 **19** just say you had a cross-examination. You testified on direct
-16:-19:-55 **20** you had a conversation May 1 with Mr. Smith about that. Do you
-16:-19:-55 **21** recall that testimony? Yes, I do. And during the course of
-16:-19:-55 **22** that conversation, in addition to what you told the jury, didn't
-16:-19:-55 **23** you say X or Y? I mean, the conversation is already in
-16:-19:-55 **24** evidence.

01:30:34 **25** MR. IVEY: Okay. All right. I think I

01:30:37 **1** understand.

01:30:40 **2** THE COURT: I'm having about as much fun with this
-16:-19:-55 **3** as I did in evidence class.

01:30:46 **4** Mr. Ivey, why don't you guys talk. Tracy,
01:30:51 **5** Josh, -- Mr. Doughten.

-16:-19:-55 **6** MR. DOUGHTEN: At some point are we going to know
01:30:57 **7** what cross-examination is?

-16:-19:-55 **8** THE COURT: I think the three of you can agree.
-16:-19:-55 **9** I'll have to meet with you and address that.

01:31:05 **10** MR. HARTMAN: I think what you said earlier it was
-16:-19:-55 **11** one, two, three (motioning).

01:31:10 **12** MR. DOUGHTEN: I don't think he said that, Steve,
-16:-19:-55 **13** but nice try.

-16:-19:-55 **14** THE COURT: I said that because of the delay in
-16:-19:-55 **15** getting their stuff out. Trying to avoid delay with the jury.

-16:-19:-55 **16** If we could get them underway. Tomorrow is Wednesday.

01:31:23 **17** They're going to go all day tomorrow; you're going to -- in

-16:-19:-55 **18** which case you'd get started on Thursday. And I have to

01:31:30 **19** adjourn at 1:30 on Friday.

01:31:38 **20** MR. BOSS: Tomorrow is Tuesday. I believe today
-16:-19:-55 **21** is Monday.

-16:-19:-55 **22** THE COURT: It's Monday.

-16:-19:-55 **23** THE COURT: Wednesday. I'm talking court time,

-16:-19:-55 **24** not real time.

01:31:49 **25** MR. HARTMAN: So we'll be Friday essentially?

01:31:53 **1** THE COURT: No, you'll be Thursday.

01:31:56 **2** Mr. Ivey, are you going to get done -- do you think

01:32:02 **3** you'll get done on Wednesday, carry into Thursday?

01:32:05 **4** MR. IVEY: If I begin Wednesday morning, my hope

-16:-19:-55 **5** and drive is to be done by the close of day Wednesday. If I

-16:-19:-55 **6** bleed over maybe an hour...

01:32:15 **7** THE COURT: That's okay. That's no problem. I

-16:-19:-55 **8** think your colleagues would like you to take up the rest of the

-16:-19:-55 **9** week.

01:32:22 **10** MR. IVEY: I'll just try introduce a bunch of

01:32:25 **11** transcripts.

01:32:26 **12** MR. SOFER: I told you, Your Honor.

01:32:32 **13** THE COURT: Somebody tell us when you're ready to

-16:-19:-55 **14** go again, or that we can go home. Whichever way.

01:32:39 **15** MR. SOFER: Understand, Judge. Again, I hate to

01:32:44 **16** keep saying this, but we've been given, I don't know now,

01:32:48 **17** probably about 100 or so segments, to give the Court an idea of

-16:-19:-55 **18** it took us months and months and months to just get the

-16:-19:-55 **19** presentation that we've seen in court near a position where we

01:33:03 **20** were confident and comfortable. We're moving as quickly as we

-16:-19:-55 **21** can, but I reserve the right, Your Honor, to come back to Your

01:33:24 **22** Honor and say: Look, it's taken us a week to get through some

-16:-19:-55 **23** of this stuff and we'd like an opportunity to challenge further

01:33:31 **24** cuts if this continues on. I also don't think it's in the

-16:-19:-55 **25** government's interest to have weeks of delay. One of the things

01:33:39 **1** I think has been forgotten is we're not in the middle, but sort
-16:-19:-55 **2** of the beginning of the government's case.

-16:-19:-55 **3** THE COURT: I am as concerned about that as
01:33:47 **4** anybody.

01:33:48 **5** MR. SOFER: Understood.

01:33:52 **6** THE COURT: Do what you do and let me know.

01:33:55 **7** MR. BOSS: Your Honor, may Mr. Hartman and I be
01:33:59 **8** excused; do you need us here?

-16:-19:-55 **9** THE COURT: Well, can you get together with them
01:34:03 **10** tonight?

01:34:04 **11** MR. BOSS: We're going to continue working on
01:34:07 **12** transcripts right now.

01:34:08 **13** MR. HARTMAN: If they're willing; we're willing.
-16:-19:-55 **14** If not, we can do it tomorrow.

-16:-19:-55 **15** THE COURT: Mr. Sofer, why don't you call them when
01:34:15 **16** we're done here.

01:34:16 **17** MR. SOFER: As long as they don't mind talking to
-16:-19:-55 **18** me when I'm at a restaurant, I have no problem. I'm told by

01:34:28 **19** Mr. Getz all of these, what we couch as inaccuracies, have been
-16:-19:-55 **20** resolved already. So all the audibility issues except, I guess,

-16:-19:-55 **21** the one that's outstanding, which is the one Your Honor listened
01:34:38 **22** to four or five times up there, we resolved with defense, so

-16:-19:-55 **23** that issue is gone. Now, if we can move that quickly through
01:34:48 **24** the other ones... again, our biggest problem, with the Amawi

-16:-19:-55 **25** team I believe we're going to be able to work most of this out.

01:34:57 **1** MR. IVEY: Can we have that meeting now?

01:34:59 **2** THE COURT: Why don't we wait. Talk with them.

01:35:05 **3** (Recess taken).

02:03:29 **4** MR. SOFER: The envelope is almost empty, Judge,

02:03:33 **5** which I think is a good thing. We essentially boiled down at

-16:-19:-55 **6** least what the government's been able to analyze thus far, which

02:03:41 **7** I think is most, if not all, of what we've been given, to

02:03:47 **8** approximately five issues, four of them fall into the hearsay

-16:-19:-55 **9** category still, but that's one that I think we're going to have

-16:-19:-55 **10** to, when it comes up... although, again, I'd ask the Court to

02:04:00 **11** be cognizant of the fact the government does not want to be in a

02:04:05 **12** position of jumping up and down out of the chair. In terms of

02:04:12 **13** audibility, we've resolved everything except for the one Your

-16:-19:-55 **14** Honor has heard. I'd ask the Court to listen to it again. If

-16:-19:-55 **15** necessary, we could play it 100 times, whatever it is that Your

02:04:23 **16** Honor wants and however Your Honor wants to listen to it,

02:04:26 **17** although I happen to agree with the best way to do it.

-16:-19:-55 **18** THE COURT: I'm only going to listen to what the

-16:-19:-55 **19** jury's going to hear.

-16:-19:-55 **20** MR. SOFER: I think that's the best way to do it,

-16:-19:-55 **21** Your Honor. You'll hear what you hear and certainly the

-16:-19:-55 **22** government will live with that. I'll tell you again that we

-16:-19:-55 **23** listened it to a number of times and we don't hear even what

02:04:46 **24** Your Honor has said that you said you hear, but again, we throw

02:04:52 **25** ourselves on the mercy of the Court.

-16:-19:-55 **1** THE COURT: It's hardly with the degree of clarity
-16:-19:-55 **2** that is desirable.

02:05:04 **3** MR. SOFER: We'll play that. Then we'd be done
-16:-19:-55 **4** for the most part with the Amawi team. The El-Hindi team,
-16:-19:-55 **5** we'll try to work with over the next few days.

02:05:14 **6** THE COURT: Maybe even this evening.

02:05:16 **7** MR. SOFER: Well, I already spoke to Mr. Hartman.
-16:-19:-55 **8** We've asked for a list because what we've been sent, it is no
-16:-19:-55 **9** longer an understandable list. They're working presumably now
-16:-19:-55 **10** to get us a list, which then we'll be able to go down, at least
02:05:34 **11** find out what we have and don't have. We're not, according to
02:05:38 **12** Mr. Hartman who's not here, we won't be getting everything until
-16:-19:-55 **13** noon tomorrow.

02:05:45 **14** THE COURT: So what do we do tomorrow, anything?

02:05:48 **15** MR. SOFER: I'd like the opportunity to spend at
02:05:51 **16** least the morning trying to go through whatever list we get
02:05:54 **17** tonight, and see how much we can identify as problematic. If,
02:06:00 **18** in fact, Amawi goes first and Mazloun goes second, and they --
-16:-19:-55 **19** and you anticipate having a half day on Friday, then my guess,
-16:-19:-55 **20** Judge, is that it's certainly possible that we'll end up having
02:06:18 **21** next weekend to deal with this. Although again, once again,
-16:-19:-55 **22** I'll just say for the record, this wasn't how we were planning
-16:-19:-55 **23** on using our time in preparing the government's case, so I hope
02:06:32 **24** that the Court will be cognizant again if we were to ask for a
-16:-19:-55 **25** short delay to try to catch up on the things that we would have

-16:-19:-55 **1** been doing these last few weeks, that Your Honor at least

-16:-19:-55 **2** consider the situation that we've been in.

-16:-19:-55 **3** THE COURT: Let me listen to this thing and go

02:06:50 **4** home.

02:06:57 **5** MR. SOFER: Your Honor, can I give a two-minute

02:07:06 **6** lesson? May I approach?

02:07:08 **7** THE COURT: Yes.

02:07:10 **8** (Discussion had off the record.)

02:07:40 **9** (Video replayed.)

-16:-19:-55 **10** THE COURT: I didn't even hear ride out there.

02:08:50 **11** MR. SOFER: You mean you think it's deteriorated

-16:-19:-55 **12** since before?

02:08:54 **13** THE COURT: Yeah. I did not hear -- I heard

02:08:57 **14** nothing from Agent Coats.

02:08:59 **15** MR. SOFER: We'll see what we can do. We'll try

-16:-19:-55 **16** the volume up. Sometimes we turn the volume up on here and you

-16:-19:-55 **17** turn the volume down on the headphones, we'll see if we can get

02:09:12 **18** it better.

02:09:38 **19** THE COURT: I didn't even hear ride out there. I

-16:-19:-55 **20** heard nothing. I didn't hear anything Agent Coats says.

02:09:46 **21** MR. SOFER: When you were pushing the buttons, is

-16:-19:-55 **22** there any chance you pushed -- there's one of these that's in

-16:-19:-55 **23** and out, if you try pushing that -- try another setting. That

02:09:58 **24** may help also.

02:10:34 **25** (Video replayed.)

02:10:34 **1** THE COURT: It was worse the second way and I hear
02:10:37 **2** nothing the first way. I'm hearing less than I heard.
02:10:41 **3** MR. SOFER: Let's try switching ear phones. I was
-16:-19:-55 **4** able to hear some of it.
02:11:26 **5** (Video replayed.)
02:11:26 **6** THE COURT: I heard a ride out there. If
-16:-19:-55 **7** anything, it's not as clear as I heard before. I don't think
02:11:37 **8** it's audible enough to propose that. I really don't.
02:11:40 **9** MR. WITMER-RICH: Question purchase 18 sets of
02:11:45 **10** these and have the jury listen to it from the laptop. It won't
-16:-19:-55 **11** require purchase of additional equipment beyond 18 of these.
-16:-19:-55 **12** THE COURT: How will that work?
02:12:00 **13** MR. WITMER-RICH: Simply A TV feeding into.
-16:-19:-55 **14** THE COURT: At some point tomorrow, before that,
-16:-19:-55 **15** why don't we go through the same exercise.
02:12:07 **16** MR. SOFER: Could perhaps right now, I don't know
-16:-19:-55 **17** you're willing to -- we have no objection to you listening to
-16:-19:-55 **18** that. We have listened to it.
02:12:21 **19** (Judge listened with laptop and headphones).
02:13:26 **20** THE COURT: Whatever it is, I don't think it's
-16:-19:-55 **21** audible enough. I really don't. So you plead the record.
-16:-19:-55 **22** Keep it for review if necessary. But I'm going to let it stand
-16:-19:-55 **23** as it is.
-16:-19:-55 **24** MR. BRYAN: I mean no disrespect to the Court, but
02:13:44 **25** there is a phenomenon in audiology that is as people age and

-16:-19:-55 **1** they get older, the bones in the ears cause them not to be able
-16:-19:-55 **2** to hear certain frequency noises as well as others. I had a
-16:-19:-55 **3** personal experience with my own mother. We have an Invisible
-16:-19:-55 **4** Fence dog collar. It makes a beeping noise before it shocks the
-16:-19:-55 **5** dog. My mother and my mother-in-law were unable to hear that
02:14:10 **6** beeping noise, and they're a little bit older.

02:14:12 **7** THE COURT: I can't hear it, and I'm the one who
-16:-19:-55 **8** has to make the decision.

-16:-19:-55 **9** MR. SOFER: I would note, Your Honor, that would
-16:-19:-55 **10** mean the entire prosecution team is getting old at a frightening
-16:-19:-55 **11** rate.

02:14:22 **12** THE COURT: Mr. Bryan, I appreciate that
-16:-19:-55 **13** suggestion, but quite candidly, unless something has changed,
-16:-19:-55 **14** I've always had really pretty acute hearing. I've got terrible
02:14:35 **15** eyesight, and sometimes there's some conjunction between the
-16:-19:-55 **16** two.

02:14:41 **17** MR. BRYAN: It has nothing to do with the ability
-16:-19:-55 **18** to hear generally, it's different frequency noises are not as
02:14:47 **19** receptive to an older adult's ear because of the aging process,
-16:-19:-55 **20** Your Honor.

02:14:52 **21** THE COURT: Well, the Wilkinson case makes quite
02:14:55 **22** clear it's up to me to determine whether or not. I don't think
-16:-19:-55 **23** that whatever deficiency due to my age I may have, I still can't
02:15:05 **24** hear enough with that degree of reliability to let the jury hear
-16:-19:-55 **25** that because I really think it's more speculative. It's

02:15:17 **1** considerably more speculative than it is well-founded. I

02:15:22 **2** thought I heard it. I listened very carefully. I hear, "ride

-16:-19:-55 **3** out there," but I don't hear anything else. If you want to ask

02:15:34 **4** Agent Coats if he's here if he has any recollection of that

-16:-19:-55 **5** conversation...

-16:-19:-55 **6** MR. SOFER: I'll proffer I've spoken to Agent Coats

-16:-19:-55 **7** and he does not have a recollection of saying what the defense

-16:-19:-55 **8** has argued that he said.

-16:-19:-55 **9** THE COURT: Does he have any recollection of saying

-16:-19:-55 **10** whatever it was he said?

02:15:50 **11** Agent, why don't we at least make a record on this

-16:-19:-55 **12** while he's here.

02:16:10 **13** THE COURT: You've previously been sworn, you

-16:-19:-55 **14** remain under oath. Have you had occasion to listen -- by the

-16:-19:-55 **15** way, you are Agent Shannon Coats, right?

02:16:20 **16** THE WITNESS: Yes, I am.

-16:-19:-55 **17** THE COURT: Have you had occasion to listen to this

02:16:23 **18** excerpt that we've been listening to this last hour and a half

-16:-19:-55 **19** or so?

-16:-19:-55 **20** THE WITNESS: Yes, I have.

-16:-19:-55 **21** THE COURT: Do you recognize your voice on that

02:16:31 **22** excerpt?

-16:-19:-55 **23** THE WITNESS: I do recognize my voice.

-16:-19:-55 **24** THE COURT: Are you able to discern anything beyond

-16:-19:-55 **25** what appears in the transcript or are you able to discern what

-16:-19:-55 **1** it was you were saying or said and does listening to it help

02:16:45 **2** your recollection in that regard at all?

-16:-19:-55 **3** THE WITNESS: I don't have any recollection what

02:16:50 **4** exactly was said, so I'm afraid I'm in the same position as

02:16:53 **5** everyone else just having listened it to. I'm the individual

-16:-19:-55 **6** that actually produced that transcript that Your Honor listened

-16:-19:-55 **7** to a moment ago and reviewed. I can make out, "ride out

-16:-19:-55 **8** there." What is prior to that is unintelligible to me, and I

-16:-19:-55 **9** can make out an "Uh" prior to that. But I don't have any

02:17:11 **10** independent recollection of what I said.

02:17:13 **11** THE COURT: And listening to it doesn't refresh

-16:-19:-55 **12** your recollection?

-16:-19:-55 **13** THE WITNESS: It does not. I listened to it many,

02:17:18 **14** many times.

-16:-19:-55 **15** THE COURT: Mr. Sofer, any questions?

02:17:20 **16** MR. SOFER: None.

-16:-19:-55 **17** THE COURT: Counsel?

02:17:24 **18** MR. BRYAN: No.

02:17:30 **19** THE COURT: There's a matter I need to talk with

02:17:33 **20** them about five minutes on the record, then maybe something I

-16:-19:-55 **21** want to talk to you about.

02:17:38 **22** MR. SOFER: Do you want us to step out a few

-16:-19:-55 **23** minutes?

-16:-19:-55 **24** THE COURT: No, we'll just go back here.

02:17:45 **25** MR. SOFER: One of the things we didn't get to do

-16:-19:-55 **1** today, which I again would like to try to do before this begins
02:17:51 **2** under the same theory, is a discussion generally in connection
-16:-19:-55 **3** with the government Giglio disclosures, what of that is
-16:-19:-55 **4** properly -- we obviously can't do that without all defense
02:18:06 **5** counsel, but I don't know Your Honor would be willing to spend
-16:-19:-55 **6** an hour or two on this sometime even tomorrow or early Wednesday
02:18:14 **7** morning. Certainly the government will make itself available.
-16:-19:-55 **8** THE COURT: I would prefer to do it tomorrow rather
-16:-19:-55 **9** than interfere with -- let me do this and you can let the other
-16:-19:-55 **10** counsel know. I will expect to be notified maybe about 10:00 by
02:18:29 **11** somebody, by e-mail or phone call to my office. When we should
02:18:38 **12** get together. I suggest we do that at the latest maybe around
02:18:42 **13** 2:00. But earlier if necessary, because I really don't want to
02:18:46 **14** spend time once we're back with the jury doing things that we
02:18:51 **15** can do tomorrow. I'm trying to give you all time to handle
02:18:54 **16** things as they come along, but we've got to get back to
02:19:01 **17** presenting evidence.

02:19:02 **18** MR. SOFER: Yes, Judge.

02:19:06 **19** (6:36)

20 (Sealed discussion in chambers follows.)

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I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

<u>/s Tracy L. Spore</u>	_____
Tracy L. Spore, RMR, CRR	Date